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The Unconstitutionality of Florida's Outdoor Yard Policies for "Close Management" Prisoners

by William Van Poyck

The constitutional right, based upon the Eighth Amendment's proscription of cruel and unusual punishment, of long term Close Management (C.M.) prisoners to outdoor recreation exercise yard is long and well established, nation wide, going back more than two decades. Federal courts have universally and consistently held that long term confinement prisoners require a minimum amount of daily outdoor yard to allow vigorous, large muscle exercise and to thus ensure the maintenance of good physical, mental

and emotional health. Put another way, prison officials who confine prisoners in long term confinement statuses in one man cells, including death row, while denying them outdoor yard, violate the Eighth Amendment *as a matter of law*. See: e.g., *Lock v. Jenkins*, 464 F.Supp. 541, 551 (N.D. Ind. 1978) ["confinement for long periods of time without the opportunity for regular exercise does as a matter of law constitute cruel and unusual punishment."]; *Sinclair v. Henderson*, 331 F.Supp. 1123 (E.D. La 1971) ["confinement of death row inmate for long period of time without opportunity for regular outdoor exercise violates Eighth Amendment as a matter of law."]; *Taylor v. Sterret*, 344 F.Supp. 411, 420 (N.D. Tex. 1972) [Same]; *Mawbry v. Ambroyer*, 568 F.Supp. 245, 252 (E.D. Mich. 1983) [Same].

These decisions, like all of the cases cited in this article, were rendered after the courts heard and entertained scores of expert witnesses who consistently testified as to the medical community's universal consensus that a minimum amount of vigorous, large muscle, outdoor exercise is necessary for prisoners in close confinement to maintain a minimal level of good health. The constitutional right to yard applies equally to unconvicted pre-trial detainees in jail, although these claims are analyzed under the Fourteenth Amendment's due process clause, while convicted prisoners' claims are analyzed under the Eighth Amendment. The following cases are a representative selection of major "yard" cases which hold that the Eighth Amendment mandates a minimum amount of outdoor yard. See: *Spain v. Procunier*, 600 F.2d 189, 199-200 (9th

Cir. 1979); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982); *Peterkin v. Jeffes*, 855 F.2d 1021 (3rd Cir. 1988); *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988); *Kirby v. Blackledge*, 530 F.2d 583, 586 (4th Cir. 1976); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980); *Walker v. Johnson*, 544 F.Supp. 345, 359-65 (E.D. Mich. 1982); *Frazier v. Ward*, 426 F.Supp. 1354 (N.D. N.Y. 1977); *Harris v. Bell*, 402 F.Supp. 469 (W.D. Mo. 1975); *Dorrough v. Hogan*, 563 F.2d 1259 (5th Cir. 1977); *Sweet v. South Carolina Dept. of Corrections*, 529 F.2d 854 (4th Cir. 1975); *Grubbs v. Bradley*, 552 F.Supp. 1052, 1130-31 (M.D. Tenn. 1982); *Heitman v. Gabriel*, 524 F.Supp. 622 (W.D. Mo. 1981); *Krist v. Smith*, 309 F.Supp. 497 (S.D. Ga. 1970), *Hendrix v. Faulkner*, 525 F.Supp. 435 (N.D. Ind. 1981), *Bono v. Saxbe*, 462 F.Supp. 146 (E.D. Ill. 1978); *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984); *Mitchell v. Untreiner*, 421 F.Supp. 886 (N.D. Fla. 1984), *Roby v. Dept. of Corrections*, 427 F.Supp. 251 (D. Neb. 1977). Many other cases, too numerous to cite here, can be located with minimal effort.

Moreover, these same courts have also held specifically that claims of "escape risk" or "security threat" are not acceptable justifications for prison officials to deny prisoners this fundamental constitutional right. See, e.g., *Spain v. Procunier*, *supra*; *Krist v. Smith*, *supra*; *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W. Va. 1981).

Furthermore, these cases consistently hold that the constitutional minimum is one hour per day of outdoor yard. A few cases have held that five (5) hours per week is constitutionally acceptable. See:

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e.g., *Heitman v. Gabriel*, supra [one hour per day of meaningful exercise], *Bono v. Saxbe*, supra [seven hours of outdoor exercise per week], *Rhem v. Malcolm*, 389 F.Supp. 964, 972 (S.D. N.Y. 1975) [expert medical testimony establishes inmates' medical need for at least one hour per day of exercise]; *Albro v. County of Onondaga*, 681 F.Supp. 991, 995 (N.D. N.Y. 1988) [inmates must be accorded at least one hour per day of exercise]; *Toussaint v. Rushen*, 533 F.Supp. 1365, 1385 (N.D. Cal. 1983) [court ordered at least 8-10 hours, minimum, of yard per week]; *Anderson v. Coughlin*, 757 F.2d 33, 35-36 (2nd Cir. 1985) [One hour per day of exercise passes Eighth Amendment scrutiny]; *Campbell v. Cauthron*, supra [One hour of outdoor recreation per day for inmates confined to cells more than 16 hours per day]; *Ruiz v. Estelle*, supra [One hour per day]; *Harris v. Bell*, supra [One hour per day]; and many others.

Notwithstanding the foregoing wealth of case law, the Florida DOC continues to deprive hundreds of its prisoners in Close Management (C.M.) status of any and all outdoor or out of cell yard time, often for years at a time, and for any reason - real or imagined - and continues to deprive all of its C.M. prisoners of the constitutionally acceptable minimum amount of yard. Florida maintains several thousand prisoners on C.M. status, which is defined by law as long term, single cell confinement. Florida prisoners are routinely kept in C.M. for 3-10 years, and longer. C.M. prisoners have severely restricted visits (one hour per month), property, books and privileges; they have no radios, T.V., hot water, and they cannot participate in any type of program (academic, vocational, educational) or leave their cells. In short, C.M. prisoners sit in tiny 6' x 9' cells, 24 hours a day, year after year, and vegetate. The rate of suicide and psychosis is, not surprisingly, quite high. C.M. status is, in effect, an indefinite de facto disciplinary confinement status.

By Florida DOC rule, C.M. prisoners receive only a maximum of two hours of yard per week, where 24 prisoners are placed into a fenced-in concrete pad measuring 24' x 33', giving each prisoner far less square footage than there is in their own cells! There is nothing to do on this "yard" except stand in the sun for two hours. It's too crowded to run or exercise.

There is no recreation equipment available. However, in reality, C.M. prisoners average only about four hours of yard per month due to consistent cancellations of yard (for inclement weather, callouts, holidays, "emergencies", etc.) and those lost hours are not made up for.

The Florida two hours per week policy is itself far below the constitutional minimum, making the rule [33-3.00 83(9) (i), F.A.C.] unconstitutional on its face. More pernicious, however, is the total denial of yard. At Florida State Prison (F.S.P.) this is accomplished by placing the prisoner on the Yard Suspension List (YSL). Prisoners can be, and are, placed on the YSL for any reason at all - usually having nothing to do with yard itself - and they can and do remain on the YSL for years. I myself was on YSL for three straight years, not for any misconduct in prison, but instead based solely upon the nature of the crime I committed on the streets (involving the homicide of a correctional officer). See: *Van Poyck v. Dugger*, 582 So.2d 108 (Fla 1st DCA 1991); *Van Poyck v. Dugger*, 579 So.2d 346 (Fla 1st DCA 1991); as well as *Van Poyck v. Dugger*, 779 F.Supp. 571 (M.D. Fla. 1991), affirmed, 977 F.2d 598 (11th Cir. 1992). I have personally known prisoners to be on the YSL for up to ten continuous years, and 2-4 years is not uncommon. At any given time at least 100 prisoners at F.S.P. are on the YSL (out of 800 C.M. prisoners).

Placement on the YSL is accomplished with absolutely no procedural due process being accorded to the prisoner (e.g., no written or prior notice of the "charge", no hearing, no right to present evidence or testimony, no right to confront any evidence or cross examine any witnesses, etc...). Because there exists no written, objective guidelines or criteria for placement on the YSL, or removal from the YSL, it is essentially up to the

Colonel and/or Superintendent (who always follows the Colonel's recommendations anyway) to decide who goes on YSL, for what reason, and for how long. It can, and should, be argued that placement on the YSL constitutes an indefinite placement on a de facto disciplinary status (or imposition of a disciplinary sanction) which requires prison officials to accord prisoners with minimal procedural due process protections in accordance with *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974), and progeny. In essence the DOC utilizes the YSL as a disciplinary punishment tool, one totally outside the scope of the existing disciplinary regulations (which mandate procedural due process protections). There is substantial case law support for the proposition that prison of officials cannot circumvent their due process responsibilities simply by renaming or relabeling the punishment imposed. See: *Sheley v. Dugger*, 833 F.2d 1420, 1427 n.8 (11th Cir. 1987); *Parker v. Cook*, 642 F.2d 865, 875 (5th Cir. 1981); *Taylor v. Clement*, 433 F.Supp. 585, 687-88 (S.D. N.Y. 1977); *Walker v. Johnson*, 544 F.Supp. 345, 347 (E.D. Mich. 1982), *Van Poyck v. Dugger*, 582 So.2d 108 (Fla 1st DCA 1991). See also: *Todaro v. Bowman*, 872 F.2d 43 (3rd Cir. 1989), *Abdul-Wadood v. Duckworth*, 860 F.2d 280 (7th Cir. 1988). Moreover, the total lack of any meaningful periodic review of the YSL status (based upon written, objective criteria and guidelines) clearly violates due process. See: *Tyler v. Black*, 811 F.2d 424 (8th Cir. 1987); *Mims v. Sharp*, 744 F.2d 946 (3rd Cir. 1984), *Sheley v. Dugger*, supra; *Kelly v. Brewer*, 525 F.2d 394 (8th Cir. 1985); *Sourbeer v. Robinson*, 791 F.2d 1094 (3rd Cir. 1986); *McCray v. Bennett*, 467 F.Supp. 187 (M.D. Ala. 1978); *Hardwick v. Ault*, 447 F.Supp. 116 (N.D. Ga. 1978); and many others. Finally, the mandatory language contained

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in 33-3.00 83(9) (i), F.A.C. gives C.M. prisoners a state created due process protected liberty interest (over and above the straight Eighth Amendment claim) in going to the yard, yet the Florida DOC freely admits that they do not accord any due process in connection with placement on the YSL.

In view of the clearly established and unambiguous case law already discussed, how then does Florida continue to get away with maintaining this clearly unconstitutional system? The answer is two fold and simple. First, for reasons not clear to me, no attorney or legal group will challenge these rules or any other blatantly unconstitutional policies extant in Florida. I've spent years and years writing scores of exhaustively detailed letters to attorneys, ACLU, The Prison Project, Florida Institutional Legal Services (a joke of an organization, funded by the state, which refuses flat out to challenge any DOC rules or policies lest their funding be yanked) and many other so-called civil rights attorneys. All reply with promises and/or referral, and expressions of sympathy, but no action. This has always been puzzling to me inasmuch as any attorney could easily take these cases, convert them into class actions, prevail and obtain substantial attorney fees. A first year law student could win on these issues. I myself have litigated and won this yard issue, and I received substantial compensation for my three years on the YSL when the DOC settled with me three days before trial. See: *Van Poyck v. Barton*, #89-1 9-Civ-J-16 (M.D. Fla, Jacksonville Division). See also: *Van Poyck v. Dugger*, 582 So.2d 108 (Fla 1st DCA 1991). But, because my case was not a class action suit, it benefited nobody but me. There are, at present, two good, solid *pro se* 42 U.S.C. §1983 on this subject now pending (as of Nov. 1994) in Jacksonville, and any attorney could step into them, convert them to class actions, and clear all of this up.

The second reason is that in our federal district court in Jacksonville we have two ultra-conservative, right wing, judges who actively thwart *pro se* prisoner suits. These judges never appoint counsel to represent any prisoner litigants, period, no matter how meritorious and valid the claim. In the 15 plus years I have personally been involved with this court, they have never appointed counsel for a single *pro se* prisoner, despite the fact that this court has the second largest prisoner civil case load in the nation. Many attorneys are frightened of and intimidated by these

two judges; I've had at least three attorneys claim that the reason they don't want to challenge these rules is because they fear those two judges.

Because the vast majority of F.S.P. prisoners are illiterate, or at least ignorant of the law, and are in confinement with no access to the law library, and are flatly forbidden to receive any legal assistance from other prisoners, including legal aides (more blatantly unconstitutional rules which the Jacksonville court is not only aware of but condones in order to minimize its case load), few competently drawn up complaints are ever filed. The few that survive because the prisoner litigant is knowledgeable in the law are usually settled by the state. These cases are never certified as class action because the court refuses to ever appoint counsel, and counsel is a prerequisite under Rule 23 (a) (4), Fed. R. Civ. Proc. With no legal counsel (either voluntary or appointed) there is no class action, and with no class action the best that can happen is that an individual prisoner wins an individual suit, leaving the DOC free to maintain its system over the remainder of the population. This is a vicious cycle, and it perpetuates the current system which allows Florida, alone in the nation, to maintain this blatantly unconstitutional policy. In the process Florida violates all A.C.A. standards for treatment of prisoners, as well as the Eighth Amendment. Until some attorney or legal group has the courage to challenge these unconstitutional rules, Florida will remain mired in its 1930's mentality and it will remain a blight on the legal community.

[Editor's Note: William Van Poyck has been awarded a one-year gift subscription to PLN for this outstanding article. It will remain our policy to award gift subscriptions (and by-lines) to any reader who submits a well researched and written article such as this one. We are particularly interested in just this type of material - a very well researched and case-cited overview of an important prison rights issue. Many of our readers have little or no access to law libraries, or must rely on an "exact cite" system. An article like this is just what our readers need to help them litigate important issues. Unfortunately, myself and the other PLN editor are kept so busy writing, keyboarding, proofreading, editing, answering correspondence, etc. etc. that we have almost no time to do the outstanding, meticulous research that is re-

quired for this kind of article. We most heartily welcome and appreciate this type of material from you, our readers.]

Racist Guard Fired

This case has little to do with prisoner rights litigation but we thought our readers would be interested in it. Ronald Lawrenz was a probationary prison guard at the Charlotte Correctional Institution (CCI) in Florida. On January 18, 1993, Lawrenz was at the home of another guard having a barbecue with four other CCI guards. The ostensible purpose of the gathering was to "celebrate" Martin Luther King (MLK) day. Lawrenz and another guard were wearing T-shirts with swastikas, labeled "White Power."

After drinking, one of the guards fired an AK-47 into the air. Police arrived and investigated the shooting during which the guards confessed to wearing the white power T-shirts to commemorate MLK day. After the local media reported the incident, the prison warden fired Lawrenz. Two of the other guards were reprimanded which was eventually dismissed on administrative appeal, the other two guards resigned.

Lawrenz filed suit claiming his firing violated his first amendment rights. The district court dismissed the suit holding prison officials had qualified immunity for firing a probationary employee and that the firing did not implicate first amendment rights because Lawrenz's speech did not implicate issues of public concern. See: *Lawrenz v. James*, 852 F. Supp. 986 (MD Fla. 1994).

Pretrial Detainee Housed at Marion

Most PLN readers are familiar with the US Penitentiary at Marion, IL. The prison was totally locked down in October of 1983 and has remained that way ever since. Prisoners are locked in their cells 23 hours a day in extremely harsh and punitive conditions which have been condemned by Amnesty International as violating fundamental human rights governing the treatment of prisoners. The federal courts have described conditions at Marion as being "sordid and ghastly" but not subject to constitutional chal-

Pretrial Detainee (cont.)

lenge. A disproportionate number of the prisoners held at Marion are jailhouse lawyers, prison activists and political prisoners. Until now the prisoners at Marion had at least been convicted of a felony but now even that has changed. This case is of little relevance to most of our readership but we think it is important for its newsworthiness.

The presumption in American law is that a defendant is supposed to be innocent until proven guilty. Because of this courts have held that pretrial detainees, who have not been convicted of any crime, may not be punished but should only be held in conditions designed to assure their safety and presence at trial. Augusto Falcon is a pretrial detainee accused of drug trafficking with alleged assets of over \$55 billion dollars (yes, billion). Falcon was indicted in Miami and is due to stand trial there. The government claims that he presents a security risk and that only the penitentiary at Marion is secure enough to hold him.

Falcon was transferred to Marion and sought habeas corpus relief to be transferred back to Miami where he would have access to his lawyers and not be subject to the harsh, punitive conditions of Marion. The district court denied his petition stating that as long as he is being held in pretrial detention the government is free to house him wherever it wants and that there is no evidence that the government intends to punish him by placing him in Marion. The court upheld the Marion confinement on several other grounds as well. Not too long ago defendants had to at least be convicted before they were sent to prison. See: *Falcon v. U.S. Bureau of Prisons*, 852 F. Supp. 1413 (SD IL 1994).

Frivolous Litigation

People hear the term "frivolous" litigation and what comes to mind are the guys who sue over a train whistle keeping them awake at night in prison. All too often prisoners seeking justice don't find any, not because their claims are frivolous but because they are too poor to afford counsel and lack the skills and knowledge to wade through the procedural thicket of litigation. Robert Hudson fell victim to this common problem.

When Indianapolis police arrested Hudson they seized about \$500 worth of his property. At the conclusion of the state court proceedings, a judge ordered the police to return the property to Hudson. The city, which was not a party to the criminal proceedings, was not notified. Hudson tried to track down his property and was ignored. In an attempt to enforce the state court order he filed suit in federal court under 42 U.S.C. § 1983 claiming that police had deprived him of his property without due process of law. The federal court denied Hudson's application to proceed *in forma pauperis*, without payment of costs, holding the suit was legally frivolous in light of *Parrat v. Taylor*, 451 U.S. 527, 101 S Ct. 1908 (1981) because Hudson had state remedies available, indeed, he had already prevailed in his state remedies. Disobedience to a state court's order is contempt of court to be enforced by that court rather than via § 1983.

Hudson then filed suit in small claims court which was dismissed because to prosecute a small claim he needed to personally appear in court or be represented by counsel. Being locked up and poor he could do neither. Meanwhile, the state criminal court bailiff wrote Hudson telling him that his property had been destroyed and there was nothing more the court could or would do about the matter. Indiana state law requires police to notify the owner of property before it is destroyed or disposed of, they did neither, flouting state law as well as the court order in the case. Hudson again filed suit in federal court claiming that his experience in small claims court showed he had no adequate state law remedies. The suit was again dismissed, on claim preclusion grounds as well as the merits.

Hudson appealed and the court of appeals for the seventh circuit affirmed the lower district court dismissals with the following comments: "Indiana can find little honor in this outcome. The prosecutor failed to notify the police of the criminal court's order. Although Indianapolis may have learned about the criminal court's order belatedly, it cannot plead ignorance of Indiana Code § 35-33-5-5(c)(1), with which it failed to comply. We were surprised, to say the least, to discover that the criminal court believes that the right response to disobedience to its order is to close the case file without further action. The city was not served with process and did not participate in the district court, but it has elected to defend

the appeal and the cost it has borne in doing so must have exceeded the value of Hudson's property. At oral argument we asked the defendants' lawyer, who carries the title 'Chief Counsel, Litigation' for Indianapolis, why the City did not compensate Hudson for his property. She replied that the City is willing to bear the costs of litigation in order to establish a reputation that will discourage frivolous demands. Well and good, if Hudson's claim were indeed frivolous. This suit is frivolous, but his claim is meritorious, and we are disappointed that Indianapolis cannot distinguish the two." See: *Hudson v. Hedge*, 27 F.3d 274 (7th Cir. 1994).

Ban on Japanese Publications Struck Down

Yu Kikumura is a member of the Japanese Red Army held at the US Penitentiary in Marion, IL. A Japanese national, he can read, speak or write very little English and Japanese remains his primary language. On more than 20 occasions Marion prison officials rejected publications which were sent to him solely because they were in Japanese, claiming that because they could not be read by prison staff, they posed a threat to prison security. Kikumura filed suit, claiming that the blanket ban violated his first amendment right to receive publications in a language he could read. Kikumura also raised an equal protection claim.

The district court dismissed the suit holding that prison officials were entitled to qualified immunity for their actions because it was not clearly established that prisoners had a right to receive foreign language publications. The district court did not address Kikumura's claims for injunctive and declaratory relief. The court of appeals for the seventh circuit affirmed the qualified immunity ruling but vacated and remanded the case for entry of declaratory and injunctive relief in Kikumura's favor.

After the litigation began the Bureau of Prisons (BOP) modified its blanket ban on Japanese publications several times. While BOP mail regulations, 28 C.F.R. § 540.71(b), make no allowance for censoring foreign language publications, only those written in code, a Marion Policy allowed for censoring publications in for-

eign languages sent to prisoners who understand English. No attempt was made to translate Kikumura's publications. After the suit began, a BOP employee fluent in Japanese was located at another prison. All Japanese publications were sent to him for screening, then returned to Marion to be delivered to Kikumura. In 1993 a Marion policy containing elaborate protection for foreign language publications was written but never enacted. A second, more restrictive policy was enacted which held that "Publications which cannot be reasonably translated may be rejected." The appeals court chastised the government attorneys for submitting the former policy statement to the lower court and indicating that it, not the actual policy, was in effect. The appellate court noted that the lower court may have been misled by BOP attorneys as a result of the misleading attachment. It based its ruling on the actual policy in effect.

The court noted that very few courts have addressed the rights of prisoners to receive mail in languages other than English [*Editor's Note: This court ruling does not cite recent court rulings from other circuit courts which have awarded substantial damages to prisoners denied foreign language mail. See: **Thongvanh v. Thalacker**, 17 F.3d 256 (8th Cir. 1994)*] which led it to conclude that prisoners do not have a clearly established right to receive publications in languages other than English.

Going to the merits of Kikumura's claim for injunctive and declaratory relief the court held that the Marion policy and practice on foreign language publications was unconstitutional. The BOP argued that the case was moot because a new policy had been enacted since the litigation began. The appeals court notes that voluntary cessation of unconstitutional conduct does not moot a case once litigation has commenced. Because the Marion policy on foreign language publications had changed so much during the litigation's course the court held that injunctive and declaratory relief was appropriate.

Analyzing the practice under *Thornburgh v. Abbott*, 490 US 401, 109 S.Ct. 1874 (1989), the court held that blanket bans of foreign publications violate the constitution and the BOP's own regulations, which had been upheld in *Thornburgh*. "In summarily excluding all Japanese language publications, Warden Turner of course did not make the particularized finding on which the *Thornburgh*

court relied.... Warden Turner here obviously did not make an individualized determination about the danger posed by these materials.... Rather, he rejected them precisely because he was unable to do so." Prison officials cannot "restrict a prisoner's rights without even looking to see how the rights might be accommodated and estimating the expense entailed by doing so."

The court analyzed Kikumura's equal protection claim and examined language based discrimination to hold that the lower court should rule on the matter first. The court affirmed the qualified immunity ruling on behalf of prison officials and remanded the case back to the lower court for further proceedings. See: *Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994).

Kansas Ad-Seg Plan Clarified

In 1980 prisoners and prison officials in the Kansas state prison system entered into a consent decree designed to improve the living conditions of prisoners confined to administrative segregation (ad seg). In 1988 the case was reactivated when the prisoners sought the court's intervention claiming the defendants had not complied with the terms of the decree. The court ruled in the prisoners' favor, finding violations of both the decree and the constitution. In 1989 the court directed the defendants to develop further plans concerning ad seg prisoners. Specifically, mentally ill prisoners should be provided with more out of cell time, more appropriate treatment alternatives and less isolation. Protective custody (PC) prisoners were to have more out of cell time and more work, program and counseling opportunities. The long term plan required the defendants to meet minimum American Correctional Association standards for housing segregation prisoners. In 1990 the court approved the submitted plans.

In 1993 there were major uprisings at two Kansas state prisons which led to a big increase in the number of prisoners held in ad seg. At the El Dorado Correctional Facility 216 prisoners, one third of the total population, were held in ad seg when the court held its hearing in April. 1994. The plaintiffs petitioned the court to enforce compliance with the decree. The plaintiffs claimed that the court's

plan required the defendants to exercise discretion and provide individualized treatment for ad seg prisoners "through the allowance of privileges commensurate with the security status of each inmate, particularly including the use of day-room space immediately adjacent to the cells." The plaintiffs note that under Kansas state law ad seg is not to be used or considered as punishment.

The court held that the decree requires that "defendants should permit privileges and property according to the purpose for placing an inmate in administrative segregation remaining mindful that to the extent possible the privileges and rights of the inmates must be the same as those of the general population... Consideration must be given for the reason the inmate was placed in administrative segregation when defendants decide what privileges and property the inmate should retain. But, the plan does not mandate individualized consideration of inmates who have been placed in administrative segregation for the same reason."

The court expressed concern that the large number of prisoners in ad seg indicated that it was being used as punishment and that the defendants were not using the procedures by which to review the long term ad seg housing of prisoners. "... the court urges defendants to review the explanation and justification for placing inmates in administrative segregation as 'other security risks' or 'pending investigation.' If the explanation and justification lacks necessary substance or credibility for any reason, including the passage of time, then the inmate should be removed from administrative segregation. Defendants should seek to limit the potential for expensive and time consuming litigation regarding administrative segregation by taking steps to assure that the letter and spirit of state regulations are being followed." "Where possible, defendants must allow inmates privileges and property commensurate with the purposes and reasons for placing inmates in administrative segregation. To the extent possible, defendants must also allow administrative segregation inmates the same rights and privileges as inmates in general population." The court also ordered a status conference between the parties to discuss the order. Because of the facts involved, this case applies only to Kansas state prisoners. See: *Porter v. Finney*, 857 F. Supp. 65 (D KS 1994).

Discriminatory Jury Selection Reversed

In the September, 1994, issue of *PLN* we reported on the unconstitutionality of racially discriminatory jury discrimination with regards to criminal trials. The right to a jury composed of members of the community also applies to civil rights suits. Frederick Davidson, a black Missouri state prisoner, sued prison officials claiming they had used excessive force against him and denied him medical care. The case went to trial and the state attorney general eliminated all black jurors (four out of four) from the jury. The all white jury subsequently returned a verdict in favor of the prison official defendants. Davidson appealed contending that the elimination of all black jurors violated his right to a fair jury. The court of appeals for the eighth circuit agreed and reversed and remanded the suit for a new trial.

In *Batson v. Kentucky*, 476 US 79, 106 S.Ct. 1712 (1986) the supreme court held that improperly excluding blacks from the juries of criminal defendants violates the equal protection and due process clauses of the fourteenth amendment. In this case, the court notes that *Batson* applies to private litigants in civil cases, see: *Edmondson v. Leesville Concrete Co.*, 500 US 614, 111 S.Ct. 2077 (1991). At trial the district court struck one black juror for cause. The state then used its three preemptory challenges to strike the remaining three black jurors. Davidson objected at trial and the state offered race neutral reasons as to why it had struck the jurors and the district court ruled on the issue of intentional discrimination. The issue on appeal was whether the reasons offered by the state were pretextual. The court held they were.

"...it is well established that [a litigant] may not justify peremptory challenges to venire (to appear in court) members of one race unless venire members of another race with comparable or similar characteristics are also challenged." "A party can establish an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken." The state's "reasons" were held to be pretextual by the appeals court because the stricken black jurors shared identical

characteristics (i.e. parents of children the same age as Davidson) as white jurors who were not struck. The state's reasons were also suspect because they asked no questions as to whether the black jurors' status as the parent of young children engendered sympathy for prisoners. The case was reversed and remanded to the district court for a new trial. See: *Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994).

Federal Courts Must Rule on State Law Claims in Beating

Michael McLaurin is an Arkansas state prisoner. A prison guard accused McLaurin of stealing cigarettes from another prisoner despite assurances from both prisoners that McLaurin was only holding the cigarettes as a favor to the owner. The guard struck McLaurin on the side of the face which knocked him to the ground. The guard then infraacted McLaurin and placed him in segregation pending a disciplinary hearing. The disciplinary hearing resulted in a dismissal of all charges 18 days later. McLaurin filed suit under 42 U.S.C. § 1983 claiming that his eighth amendment right to remain free from cruel and unusual punishment had been violated.

The district court held a trial which concluded that McLaurin had done nothing to warrant the assault and that the guard's blow was not made as good effort to maintain or restore discipline or order. McLaurin suffered pain but no permanent injury. On the day of trial McLaurin's appointed counsel orally moved to amend the complaint to add state law claims of assault, battery and outrage. The guard opposed the motion. The court decided not to rule on the state law claims because they weren't raised in the original *pro se* complaint and counsel didn't amend the complaint. The court declined to exercise its pendant jurisdiction. Both parties appealed. The court of appeals for the eighth circuit held that the district court had erred in refusing to consider the pendant state law claims. The court affirmed the ruling in favor of McLaurin and remanded for further proceedings.

The appeals court briefly discussed the guard's appeal by noting that he was not entitled to dismissal of the suit because McLaurin had suffered pain as a result of

an unprovoked assault. Thus, the lower court properly granted relief by ruling on McLaurin's eighth amendment claims.

The court gave a detailed discussion of federal court's supplemental jurisdiction and authority to hear state law claims. Under 28 U.S.C. § 1367 federal courts have supplemental jurisdiction over all other claims related to claims in the action over which they have original jurisdiction. The appeals court held that section 1367(a) is a mandatory law which does not allow the district courts to decline jurisdiction over claims supplemental to the original federal claims. The law does provide some limited exceptions which allow a court to decline to exercise its supplemental jurisdiction, i.e. if the claim raises a novel or complex issue of state law, the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; the district court has dismissed all claims over which it has original jurisdiction or, in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Because the district court did not rely on any of the allowed exceptions to reject McLaurin's state law claims, the appeals court concluded the lower court erred by refusing to consider the claims. "...in the absence of the circumstances described in subsections (b) and (c), § 1367(a) requires the district court to accept supplemental jurisdiction over the state law claims McLaurin raised in this case." Moreover, substantial interests of justice are served by allowing federal courts to hear and rule on pendant state law claims.

The state law claims in this case rest on identical facts that are the basis for the federal eighth amendment claims. Thus, on remand the lower court can determine whether to rule on the pleadings as they stand or to allow amendment of the pleadings to put the defendants on notice of all the claims raised and allow the district court to resolve them on their merits.

State prisoners bringing federal civil rights suits often include state law claims in their complaint. While many states have laws providing greater protection of rights than federal law, such as medical malpractice, negligence, simple assault, battery, disciplinary rules, etc. the fact remains that state courts rarely, if ever, enforce these laws (perhaps because they are elected). This leaves prisoners with "rights" but no remedy by which to enforce them. Traditionally federal courts

have been more inclined to afford prisoners the protection of the law. However, federal courts frequently decline to rule on pendant state law claims, as the district court in this case did. It is important to aggressively pursue pendant state law claims in federal suits because it increases the chances of recovery, both in monetary damages and injunctive relief. Readers should note that if the federal claims lose, the court loses jurisdiction over the pendant state law claims, so pendant state law claims should only be a part of strong Federal claims likely to win. If your federal claims are weak you will lose your state claims automatically if you lose your federal claims. See: *McLaurin v. Prater* 30 F 3d 982 (8th Cir. 1994).

Legal Papers Filed When Mailed

Prisoner litigants representing themselves face greater problems when litigating than do most ordinary litigants. Not only are they usually untrained in the law but they lack control over basic things such as the mail. Courts operate on deadlines which often result in penalties for a party whenever they miss the deadline. This has an especially harsh effect on prisoner litigants who are forced to rely on prison officials to forward their pleadings to the post office for mailing. In *Houston v. Lack*, 487 US 266, 108 S.Ct. 2379 (1988) the supreme court held that a prisoner litigant's papers were deemed "filed" when they were given to prison officials for mailing rather than when they were actually received in court. Since then courts have gradually extended *Houston* to apply to various other legal documents, i.e. appeals, bankruptcy petitions, motions, objections, etc.

Lawrence Caldwell is a federal prisoner in Lewisburg, PA, who sued the US marshals in Oregon over damage to his personal property during a search of his home. The lower court ruled against him and Caldwell filed a motion for judgment notwithstanding the verdict (JNOV). The lower court held the motion was untimely because it was received well past the due date. Caldwell claimed he had placed the motion in the prison's "legal mailbox" two days before it was due in court. Caldwell appealed and the ninth circuit instructed the lower court to determine whether Caldwell had met the dead-

line. The lower court held that Caldwell had not met the deadline by placing the motion in the prison mailbox. Again Caldwell appealed and the ninth circuit reversed and remanded.

The appeals court notes that *Houston* is premised on the fact that prisoner litigants must mail their legal documents through the conduit of prison authorities "whom he cannot control and whose interests might be adverse to his." In this case, Caldwell filed an affidavit stating he had followed the procedure established at the prison he was confined in and placed his motion in the "legal mailbox" for processing by prison officials. The court concluded that this satisfies the requirements of *Houston* and thus, Caldwell's motion was indeed filed in a timely manner.

The court notes that when a prisoner litigant submits an affidavit stating he has timely complied with a procedural deadline by submitting a document to prison officials for mailing, the burden shifts to the opposing party to produce evidence to the contrary. Because prison officials in this case do not keep a log for the legal mailbox the court held the defendants had not met their burden of proof on this issue. It was no defense that Caldwell could have sent his pleadings via certified mail because in this case the prison had set aside a special procedure by which to send legal mail. The court agreed with *In Re Flanagan*, 999 F.2d 753 (3rd Cir. 1993) and held that "...pro se prisoner's deposit of a letter in the legal mailbox constituted delivery to prison authorities for purposes of *Houston*, notwithstanding the availability of a more expensive alternative." The case was remanded to the lower court for consideration of Caldwell's motion on the merits. See: *Caldwell v. Amend*, 30 F.3d 1199 (9th Cir. 1994).

No FLSA Protection for Prisoner Workers

Past issues of *PLN* have extensively reported on the struggles by prisoners to obtain the minimum wage for industrial and production work performed in prison. Much of this litigation has focused on the federal Fair Labor Standards Act (FLSA) 29 U.S.C. § 201-219 which mandates that workers be paid the minimum wage. Another focus has been the Ashurst-Sumners Act (ASA), 18 U.S.C. § 1761-62, which prohibits the interstate

transportation of prisoner made goods unless the prisoners have been paid the minimum wage. In the past, these efforts have met with extremely limited success. The eighth circuit has turned back yet another attempt by prisoner workers to receive minimum wages.

Minnesota state prisoners employed in the manufacture of auto parts, file folders and clothing and in data entry and telemarketing services filed suit under FLSA and the Ashurst-Sumners Act (ASA) seeking the minimum wage for their labor. The prisoners are currently paid between \$0.50-\$0.75 an hour. Minnesota prisoners are required to work by state statute or they forfeit good time, resulting in an increase in their prison sentence. The district court dismissed the suit, holding that prisoners were not entitled to minimum wage. See: *McMaster v. Minnesota*, 819 F.Supp. 1429 (D MN 1993). *PLN*, Vol 4, No 9. The prisoners appealed and the court of appeals for the eighth circuit affirmed.

Anyone litigating or contemplating litigating this type of issue should read this case. The appeals court gives an extensive history of prisoner FLSA litigation, noting that while the supreme court has not considered the issue, virtually every circuit court to consider the issue has concluded that prisoners are not entitled to the minimum wage. Two courts which have held prisoners are entitled to the minimum wage are *Watson v. Graves*, 909 F.2d 1549 (5th Cir 1990) which held that prisoners working for a construction contractor were covered by FLSA, and *Carter v. Dutchess Community College*, 735 F.2d 8 (2nd Cir. 1984) in which a prisoner who tutored for a community college sued claiming he was entitled to the minimum wage for his efforts. This case is distinguishable from those because Minnesota prisoners are required to work directly for the state while in prison.

The court gives a detailed history of the congressional intent behind FLSA, concluding "The primary purpose of the FLSA-providing minimum standards of living for workers-has no application in the prison context. Food, clothing and shelter are provided to the prisoners by the state, regardless of their ability to pay." This and the enactment as the ASA led the court to conclude that congress did not intend to include prisoners within the protection of the FLSA by considering them to be "employees."

The prisoner plaintiffs in this case also sued under the ASA claiming that the

products they produced were shipped in interstate commerce in violation of the Act. The appeals court held that the ASA is a criminal statute which provides for no private cause of action or enforcement. Thus, prisoners or other private parties cannot sue to enforce the ASA under 42 U.S.C. § 1983 or any other statute. Enforcement of the ASA is left to the US attorney's office. For a more detailed discussion of this issue see *Preston Glove Co v. Bentsen*, 845 F.Supp. 401 (ND Miss 1994), *PLN*, Vol 5, No. 7. "We conclude that Congress' purpose in enacting the Ashurst-Sumners Act was to protect private business, not to protect the inmate worker." "Ashurst-Sumners does not provide a private cause of action, either expressly or by implication." See: *McMaster v. State of Minnesota*, 30 F.3d 976 (8th Cir. 1994).

Limits on Contact Visits With Counsel Reversed

Lee Barnett is a California state prisoner on death row. He filed suit under 42 U.S.C. § 1983 claiming that prison officials had retaliated against him for filing civil rights suits against them; that he was denied contact visits with his attorney in violation of his right of access to the courts; that he was denied property without due process and that he was denied contact visitation privileges. The district court dismissed the suit in its entirety for failing to state a claim upon which relief could be granted. The court of appeals for the ninth circuit affirmed in part, reversed and remanded with regards to the denial of contact visits with counsel.

Prisoner's right of access to the courts includes contact visits with their attorneys. Prison officials can limit this right if they can show that the limitations are reasonably related to legitimate penological interests. The appeals court reversed because in this case the defendant prison officials made no such showing. The case was remanded for further consideration by the district court. The court affirmed dismissal of the other claims. See: *Barnett v Centoni*, 31 F.3d 813 (9th Cir. 1994)

MS Bans Appliances

In August, 1994, the Mississippi state legislature held a special session to deal with prison overcrowding. Rather than deal with that issue, the legislature soon became embroiled in a debate on how to worsen prison conditions even more. Proposals were made to "restore fear to prison," of canings, of making prisoners "smell like a prisoner," of burning and frying prisoners, of returning executions to the county seat and, as Republican governor Kirk Fordice put it, "making Mississippi the capital of capital punishment."

Instead the legislature settled for banning weight lifting equipment, televisions, radios, record players, tape decks, compact disk players, computers and stereos. Prisoners will also be forced to wear striped uniforms with "convict" written on the back. State Representative (D) Mack McInnis, the ranking intellectual of the legislature, told his colleagues: "When you see one of these boogers loose, you'll say, 'I didn't know we had zebras in Mississippi.'"

The Mississippi DOC is seeking an advisory opinion from that state's attorney general, in the meantime it is not enforcing the new laws. The new Mississippi law also bans "personal air conditioners for prisoners," despite the fact that no prisoners actually have air conditioners. This indicates the sham nature of this type of law. It sounds good in the next days paper whether or not it has any bearing in reality, and regardless of whether it is a sensible or meaningful social policy.

TX Guards Charged in Beating Murder

On October 7, 1994, 15 of about 300 prisoners in the recreation yard of the Terrell Prison Unit in Livingston, TX, attacked prison staff. One guard suffered a broken nose. Prison guards beat several prisoners in retaliation for the attack. On October 9, 1994, Michael McCoy died in a hospital after being found in his cell unconscious with head injuries. He was serving a six year sentence for burglary and unauthorized use of a motor vehicle.

On October 12, 1994, prison guards Alex Torres and Joel Lambright were charged with murder in McCoy's death and released on \$50,000 bail. Both guards

were relatively new guards, hired in January and February, 1994, respectively. The prison opened in December, 1993. Andy Collins, Texas prison boss, was quoted stating that the murder charges against the guards show "we will not tolerate unnecessary force" against prisoners.

Six prisoners face charges resulting from the initial melee. Prison officials stated that additional charges were expected against as many as a dozen other guards at the prison arising out of McCoy's death and the beatings of other prisoners.

CA BPT Lawyer Sentenced

David Eugene Brown was the chief counsel for the California Board of Prison Terms (BPT) from 1982 until June, 1994. He worked his way up through the prison system's ranks, starting as guard, then captain and going to law school, after which he was appointed to serve on the BPT. On September 7, 1994, Brown was sentenced to a year in jail after he pled guilty to seven misdemeanor charges of violating probation terms stemming from his 1991 conviction of stalking his former girlfriend. He also violated a restraining order that the girlfriend, Sacramento City Unified School District Trustee Mary Wimberly, had placed against him. In exchange for his guilty plea, two counts of felony stalking and one count of annoying phone calls were dropped.

Brown's first conviction in 1991 was for vandalizing Kimberly's car and making threatening phone calls to her. Despite his criminal conviction and probation status, Brown continued to serve as the BPT's chief counsel. Brown's latest criminal conviction results from again stalking Kimberly. She stated that since his 1991 conviction he would call her 10 to 15 times a day at home and work. She said she received more than 100 pieces of mail, including letters from Folsom prisoners responding to letters sent to them with Wimberly's return address. She also received numerous magazine subscriptions that she had to cancel. Numerous letters with defamatory remarks about Wimberly were sent to the school district, and read by parents and children. One letter sent to the school district president stated: "The students at several district high schools are circulating pornographic

photographs of board member Mary Kimberly."

Brown's defense attorney said he was not a bad person, "when you have a broken heart, it hurts." When Sacramento Superior Court Judge Gary Mullen sentenced Brown he imposed the one year sentence requiring Brown to serve six months in jail and remainder could be served on weekends if he qualified for work release. One wonders if Brown were not the BPT attorney if he would have been allowed to plea bargain to such reduced charges rather than being prosecuted for felony stalking.

Source: *Sacramento Bee*, 9/8/94

Warden Killed in Alabama

In Mid-October, 1994, Kelvin Washington, 27, was arrested and charged with the murder of Charles Farquhar, the warden of a state prison cattle ranch in Greensboro, Alabama, his wife and two prisoners. The bodies believed to be that of Farquhar and his wife were found bludgeoned in his brick ranch house that had been set ablaze. Both the prisoners had been shot to death. The bodies were burned beyond recognition in the blaze and were delivered to the state's forensic scientists for positive identification.

Farquhar had been employed by the Alabama DOC for more than 30 years and the prison was named after him. Washington was serving a 20 year sentence for theft and assault. No motive was given in the killings.

Prisoner Shot Dead

On September 30, 1994, death row prisoner Timothy Pride was shot dead by San Quentin, California, prison guards after being involved in a fight with another prisoner. According to witnesses, Pride was backing away from the other prisoner when shot. A prison spokesperson justified the killing saying: "From the taxpayers' viewpoint, was the death of Timothy Pride a loss for society? Huge amounts of tax dollars are spent on appeals. This will probably free up a million dollars that can be spent for a child's education."

Over the past ten years California prison guards have shot dead 34 prison-

ers, over three times as many of those killed in all other states combined. In at least two other cases mentally ill prisoners have died after being shot repeatedly with electric stun guns. The Prison Law Office described Pride's killing as "a clearly unwarranted use of deadly force." None of the prisoners who witnessed the killing were interviewed. Any money saved by Pride's murder will only go towards fueling California's billion dollar prison building machine, even as large sums of money are cut from children's education.

Source: *Socialist Worker*, Nov. 4, 1994.

Jail Population Cap Affirmed

Prisoners and detainees in the Angelina county jail in Texas filed a class action suit claiming that overcrowding at the jail violated their constitutional rights. The district court agreed and entered an injunction imposing a population cap on the jail. The defendant county jail and sheriff also filed a third party suit in this action against the state of Texas and the Texas Department of Criminal Justice (TDCJ) claiming it was responsible for the overcrowding by not promptly taking sentenced prisoners out of the jail. This backlog of sentenced prisoners was one of the causes of overcrowding, they claimed. The district court dismissed the county's suit holding that the eleventh amendment prohibits state government entities from suing the state. The court of appeals for the fifth circuit affirmed.

The appeals court discussed the legal questions reviewing courts must determine when examining claims that jail (as opposed to prison) conditions are unconstitutional. Pretrial detainees are protected by the fourteenth amendment while convicted felons are protected by the eighth amendment. Detention conditions for detainees will be found to violate their right to liberty without due process if they amount to punishment of the detainee. While detainees' confinement necessarily involves a loss of liberty "Deciding whether a condition of confinement amounts to 'punishment' under a due process analysis turns on whether the 'disability' is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose". The court noted that conditions which violate the eighth

amendment's ban on cruel and unusual punishment surely amount to "punishment" under the fourteenth amendment.

The lower court found that housing more than 111 prisoners in the Angelina county jail amounted to violations of the eighth and fourteenth amendments for detainees and convicted felons. In doing so it properly applied the appropriate legal standards and conducted the proper legal inquiry into jail officials' subjective intent as well as objective conditions at the jail. See: *Farmer v Brennan*, 114 S.Ct.1970 (1994). *PLN*, Vol 5, No.7.

The appeals court held that the objective component of the constitutional violation was supported by the fact that the Texas Commission on Jail Standards had issued a remedial order limiting the jail's population to no more than 111. While not dispositive, it is instructive. The jail's design capacity was for 111 prisoners, while this is not the equivalent of constitutional capacity it is relevant to a court's constitutional inquiry. Extensive evidence was presented that, due to the jail's construction, design and staffing, any increase in population, at times reaching 159 prisoners, results in a breakdown of jail classification whereby stronger prisoners prey on the weaker, there is inadequate medical care for prisoners, drug and alcohol use and fighting increase. The evidence also showed that overcrowding had a negative impact on jail security, recreation and delivery of medical services.

The subjective component of the eighth amendment analysis was met by showing that jail officials and the sheriff were all well aware of the overcrowding at the jail and resulting conditions due to the report from the state Commission on Jail Standards, incident reports, and testimony from the defendants themselves and the litigation itself. The defendants claimed that overcrowding was beyond their control. But evidence at trial showed that the county could, and had, controlled overcrowding through means as simple as delaying action on arrest warrants, increasing the use of probation, other facilities and electronic monitoring. These were all available alternatives which could address the unconstitutional conditions at the jail. The county claimed it lacked the funds to pay for a larger jail. The appeals court notes that in *Wilson v. Seiter*, 501 US 294, 111 S.Ct. 2321 (1991) the supreme court left open the question

Population Cap (cont.)

of whether a cost defense is available in eighth amendment suits. The fifth circuit has previously rejected such a defense and held that even if it were available, in this case the testimony of the defendants indicated that funding was not a problem as the county sheriff routinely ran over budget.

The appeals court affirmed the lower court's imposition of the 111 population cap. In its order the lower court stated that it would entertain motions from the defendants to modify the cap if they showed that they had made changes in the jail's physical plant, increased staffing and upgraded its classification system so that prisoners in excess of 111 could be housed in the jail without violating the constitution.

Dismissal of the county claims against the TDCJ and state were affirmed. In an extensive analysis of eleventh amendment jurisprudence the court notes that subdivisions of the state cannot sue the state in federal court unless specifically authorized to do so by congress. See: *Harris v. Angelina County, Texas*, 31 F.3d 331 (5th Cir. 1994).

Law Library Access Not "Core" Bounds Requirement

In a major setback for Washington state prisoners the ninth circuit has held that prisoners do not have a right of access to prison law libraries. William Vandelft was incarcerated while at the Washington Corrections Center in Shelton. He served a sanction of segregation and filed a state Personal Restraint Petition (PRP) challenging the infraction. In the meantime he was transferred to the Clallam bay Corrections Center (CBCC). The DOC responded to the PRP and Vandelft had 20 days in which to respond. His response was due on May 13, 1991. On May 21 he was placed in protective custody, i.e. segregation. While in segregation Vandelft was denied access to legal reference materials which could not be checked out of the prison law library and to any hard bound books. He did receive copies of exactly cited cases which he had re-

quested. On July 16 Vandelft was transferred to another prison and released from segregation. His PRP was dismissed a month later by a state court.

Vandelft filed suit under 42 U.S.C. § 1983 claiming that CBCC officials had violated his right of access to the courts. His lawsuit dealt with four factual issues: 1) he was denied physical access to the law library, 2) he was required to request legal materials by exact citation; 3) he was denied hardcover legal materials; and 4) he was denied copies of some legal materials because of copyright laws. He claimed that these restrictions resulted in his inability to research and prepare a reply in his PRP or file a collateral attack on his criminal conviction.

District court judge Thomas Zilly granted prison officials' motion for summary judgment because Vandelft had not alleged actual injury as a result of being denied access to the courts. Vandelft appealed claiming that a showing of actual injury was not required and if it was, that he had shown it.

In *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977) the supreme court held that prisoners have a constitutional right of adequate access to the courts. To satisfy their obligation to meet prisoners' access rights, prison officials must either provide prisoners with the assistance of persons trained in the law or access to adequate law libraries and assist them in preparing their legal papers for filing with the courts. "...there is no established minimum requirement for satisfying the access requirements; rather, 'a reviewing court should focus on whether the individual plaintiff before it has been denied meaningful access.'"

The ninth circuit has established a two step analysis for prisoners' legal access claims. The first step requires the court to determine "whether the claimant alleges a denial of adequate law libraries or adequate assistance from persons trained in the law." Second, if the claims do not involve either of *Bounds* two "core requirements" then the court must determine whether the plaintiff has alleged an actual injury to court access. "'Actual injury' is defined as a 'specific instance in which an inmate was actually denied access to the courts.' There is no actual injury requirement if either of the core requirements under *Bounds* is involved, i.e. adequacy of the law library or legal assistance." In order to state a claim for relief Vandelft, had to establish either that

he was denied access to an adequate law library or trained legal assistance or that he was actually denied access to the courts.

The appeals court held that if a prison law library is adequate, prisoners' reasonable access to it is not a "core requirement" of *Bounds*. "Lack of reasonable access to the law library is not the equivalent of denial of access to the courts. If the law library itself is inadequate, no amount of access is going to let the prisoner do what he needs to do, because what he needs is presumably not there. But if access to an adequate library is unreasonably restricted only during a defined time period, then that can perhaps be cured by letting the prisoner have adequate access later. In other words, a prisoner may be able to make up for being too limited in his access to the right materials, but he cannot compensate for the unavailability of the materials he needs."

Prisoners claiming their right of access to the courts have been violated due to inadequate law library access must establish two things: (1) they must show that the access was so limited as to be unreasonable and (2) they must show that the inadequate access caused them actual injury, i.e. show a "specific instance in which [he] was actually denied access to the courts."

The appeals court analyzed Vandelft's claims and held that, as a factual matter, he did not show any actual injury to his right of access to the courts. Vandelft claimed he was relying on state appeals rules allowing him thirty days in which to respond to the state's motion to dismiss his PRP. That 30 day period ended the second day he was in protective custody. The court held that his response should have been substantially completed by then. His affidavit does not show he had even started on the petition when he was placed in segregation. Further, he did not seek an extension of time from the court in order to file his reply after his release from segregation, nor did he seek reconsideration of the dismissal order on the basis that he had been unable to file a reply. "Vandelft simply failed to show that the restrictions on library access had any effect on his access to the court relative to his personal restraint petition."

The court also held Vandelft had failed to show any injury with regards to his post conviction relief efforts. Washington limits post conviction challenges to one year after conviction. Vandelft was in segregation for 57 days, the court notes that he made no effort to seek post con-

viction relief during the 308 day period he was not in segregation. The appeals court affirmed the grant of summary judgment in favor of prison officials.

Judge Canby filed a detailed dissent to the majority opinion. He notes that the ninth circuit, in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), held that the provision of cases on an "exact citation" basis for segregation prisoners was unconstitutional. He states that prior ninth circuit cases have never imposed an "actual injury" requirement for prisoners who are denied actual, physical access to prison law libraries "Bounds imposes a constitutional duty on prisons to assist prisoners by providing an adequate law library. It defies common sense to hold that the prison does not violate this duty when it denies those same prisoners access to the library." See: *Vandelft v. Moses*, 31 F.3d 794 (9th Cir. 1994).

[Editor's Note: Long term segregation prisoners, i.e. those serving indefinite administrative segregation terms, may have a better shot at showing "actual injury" because they can show there is no probability they will be released from segregation in order to access the prison law library. Segregation prisoners with active cases may also seek orders from the court they have cases in ordering their access to prison libraries, such efforts will go towards showing "injury" if they lose the case due to inadequate law library access.]

WSR Guard Convicted for Soliciting Assault

On June 3, 1994, Washington State Reformatory (WSR) guard Roger Wallace, 28, was arrested at the Monroe, Washington, prison on charges of soliciting a prisoner, Samuel McNeal, to assault Gerald "J.D." Enquist, another prisoner. On June 9, 1994, Wallace was charged in Snohomish County Superior Court with solicitation to commit second degree assault.

The Affidavit of Probable Cause filed by Deputy Prosecutor James Townsend in Case No. 94-1-00760-7, states: "On 6/3/94, Mr. McNeal agreed to wear a wire and record a conversation with the defendant during the defendant's work shift at the Washington State Reformatory. The recording was authorized by Judge

Kathryn Trumbull. During the recorded conversation the defendant indicated the other guard wanted Mr. Enquist to be killed but that he did not think homicide would be such a good idea. The defendant finally indicated he wanted Mr. Enquist to suffer a broken bone or bones. The defendant indicated he would pay a sum of \$200 in exchange for Mr. Enquist's suffering a broken arm." "Department of Corrections have confirmed long term disputes have existed between Mr. Enquist and the other guard."

According to Townsend's affidavit, the offer was first made in May, 1994, when Wallace approached WSR prisoner Samuel "J-Bonee" McNeal and offered him \$200 to break the arm of Gerald "J.D." Enquist. McNeal immediately reported this offer to prison officials who called in the Snohomish County Sheriffs Department on May 25, 1994.

The plot apparently arose out of a desire by Wallace to retaliate against Enquist for the numerous grievances and complaints that Enquist, a prison law library clerk, had filed or assisted other prisoners in filing against Wallace's girlfriend Cheryl Swanberg, who is also a guard at WSR. The complaints include Swanberg making false claims that prisoners were informants, smoking in no smoking areas, losing control of herself by screaming at prisoners, interfering with prisoners' access to the law library and legal interpreters and more. For years the DOC refused to act on complaints regarding Swanberg's unprofessional and troublesome behavior.

The charging information filed by the prosecutor in the case alleges: "Criminal Solicitation in the second degree, committed as follows: That the above named defendant, with intent to promote the crime of second degree assault, did offer money to another person, to wit: Samuel McNeal, to engage in conduct which would constitute the crime of Second Degree Assault, contrary to RCW 9A.28.030 and RCW 9A.36.021(1)(a), a felony."

When Wallace was arrested at WSR he was placed into an orange jail jumpsuit. WSR Superintendent Ken Ducharme was quoted by the *Seattle Times* saying: "I didn't want our uniform to go to jail. It would have been problematic for him (Wallace) to go to a cell like that."

Swanberg bailed Wallace out of the Snohomish County jail the same day he was arrested. Unconfirmed reports state that Swanberg was also arrested by

county Sheriffs officers at Wallace's court arraignment. Both Swanberg and Wallace were placed on paid administrative leave while DOC officials and the Sheriff's office investigated further. McNeal was moved to the McNeil Island prison.

When interviewed by *Seattle Times* reporter Christy Scattarella, Wallace is quoted in the June 15, 1994, edition as saying that he was the real victim in the alleged plot and that Enquist and McNeal set him up "and they did a damn good job of it." So good in fact that Wallace is recorded making the solicitation to commit the assault. In the same interview, Wallace claimed that Enquist supposedly enjoys "special privileges" at the Reformatory and is "untouchable" by staff allegedly because he is an informant. Ducharme was quoted denying that Enquist is an informant or that he has any special privileges. What Enquist does have, according to Ducharme, is brains. "He's a very bright guy. You'd better follow your policies and rules or he'll call attention to it." Deputy Prosecutor Townsend also dismissed Wallace's claims, of which he had no knowledge, as irrelevant. "That's still no reason to try and break someone's arm."

Wallace's claims of innocence didn't prevent him from pleading guilty to the charge of second degree assault. On November 2, 1994, he was sentenced in Snohomish County Superior Court by judge James Allendorfer to one year in jail, with all but 30 days suspended. Both the prosecution and defense had requested that the entire sentence be suspended. He was also required to pay \$625 in attorney fees for his public defender. In exchange for not being charged with any felony, Swanberg had agreed to testify against him. So much for honor among thieves. It is not known whether either will continue their careers as prison guards in Washington.

WI Enacts Sex Predator Law

By Jan Starks

On May 26, 1994, Wisconsin Governor Tommy Thompson enacted a Sexual Predator Law, officially called 1993 Wisconsin Act 479. It was designed especially for two current prisoners: Gerald Turner, who in 1973 killed 9 year old Lisa French on Halloween night and Raymond Matzker, who in 1982, was convicted of five counts of enticing and sexually as-

Sex Predator Law (cont.)

saulting 8-12 year old boys. He was then the Director of the Winnebago Mental Health Institution under an assumed name.

The law originated because Turner was released on Mandatory Release (MR), but was later returned to prison from a Milwaukee half way house due to pressure applied on the DOC by the general public. Matzker was slated for release on June 7, 1994.

Matzker is the first person to be tried under the new law and is scheduled for trial on July 5, 1994. According to the new law, if a jury of 12 finds against him, he will be committed to prison in twelve month increments. After six months he can petition the court for release. If the court denies his petition, a jury trial will again be held in July, 1995. The law currently affects only 12 individuals.

The new law defines the following: "Mental Disorder: A congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence. Sexually motivated: means that one of the purposes for an act is for the actor's sexual arousal or gratification. Sexually Violent offense: means any of the following. A) Any crime specified in § 940.225(1) or (2), 948.02(1) or (2), 948.025, 948.06 or 948.07. B) Any crime specified in § 940.01, 940.02, 940.05, 940.06, 940.19(4) or (5), 940.30, 940.305, 940.31 or 943.10 that is determined, in a proceeding under 980.05(3)(b) to have been sexually motivated."

"Sexually violent person: A person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty or not responsible for a sexually violent offense by reason of insanity or mental illness, defect or disease, and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence."

The law contains a variety of other areas and can be obtained by writing: Assembly Chief Clerk, Wisconsin State Capitol, Madison, WI. 53707.

[Editor's Note: In 1990 Washington state passed the Community Protection Act which allowed for the indefinite im-

prisonment of "sexual predators" after they finish their terms of imprisonment and without any new crimes being committed. The law was upheld by the state supreme court and is currently being challenged in federal court. We will report on developments challenging these laws.]

OK Early Release Law Legal

In response to prison overcrowding, the Oklahoma state legislature has passed the Oklahoma Prison Overcrowding Emergency Powers Act, Oklahoma Statute 57, § 570-576. The act permits the prison system to release prisoners with less than medium custody convicted of lesser crimes in order to free up prison space. Timothy Keeton, an Oklahoma state prisoner, filed suit against the state claiming that the statute was unconstitutional because only certain classes of prisoners were eligible for early release.

The district court dismissed the suit for failure to state a claim. The court of appeals for the tenth circuit affirmed the dismissal. The court held that because the suit did not claim discrimination due to a suspect classification, i.e. race or gender, it would be examined as to whether it held a rational relationship to a legitimate state interest.

The court held that states have a legitimate interest in reducing prison overcrowding. In doing so, the state may release only those prisoners convicted of lesser crimes who may pose less of a threat. "Consequently, since there is no evidence that Appellant is being treated differently than similarly situated prisoners, i.e., prisoners with the same or similar classification, and the Act is constitutional, Appellant has failed to state a claim upon which relief could be granted." See: *Keeton v. State of Oklahoma*, 32 F.3d 451 (10th Cir. 1994).



Tennis Shoes Cost US Taxpayers Over \$8,000

Though this is an unpublished case, and one we might ordinarily consider of small consequence, the prisoner litigant - David Cerullo - provided *PLN* with extensive information and background on the case that lends a very unusual perspective.

David Cerullo knew he was going to do some federal time. Two months before his sentence started, on advice of his pretrial services officer, he purchased a \$37.45 pair of tennis shoes from a K-Mart in Denver, Colorado. On April 1, 1993, he self-surrendered to the Federal Prison in Littleton, Colorado to begin serving his sentence. He wore his new tennis shoes "in" hoping that he would thus have decent tennis shoes to wear for the first year for two of his sentence.

On April 14, 1993, he was ordered to accompany a guard to a loading dock area. Cerullo was wearing his tennis shoes, and was unaware that he was being escorted to a work detail. He was taken to a dumpster and ordered to clean it and the adjoining loading dock with a pressure cleaning machine. Shortly into the task, and soaking wet, Cerullo asked the guard for permission to go change into work boots. Despite the fact that Federal Bureau of Prisons (BOP) policy requires prisoners to wear institution issued work boots on all work details, the guard refused Cerullo's request and threatened to punish him if he didn't continue working. Cerullo finished the detail, but his tennis shoes were totally ruined in the process.

He approached BOP staff at the prison and complained about his personal shoes being ruined. They laughed. He went to the law library and, after hours of combing through law books, found the Federal Tort Claims Act (FTCA). He requested the appropriate Tort Claim forms from the prison staff, who told him they were unable to provide them. After some further prodding, the forms were located. Cerullo submitted a claim to the BOP for \$37.45.

A couple of months later a guard came to get Cerullo's ruined shoes. He said the BOP needed to photograph them for their investigation of his claim. Three months after that Cerullo received a letter from the BOP regional office in Kansas City stating that their investigation into his

Tort Claim showed no fault by BOP staff and that his claim was denied.

The Federal Tort Claims Act imposes a duty on government agencies to settle legitimate minor claims in order to prevent congesting Federal Court dockets with litigation of those minor claims.

Cerullo wrote a letter to the US Attorney suggesting settlement negotiations rather than the filing in court to seek relief on this \$37.45 claim. The US Attorney did not respond.

On November 5, 1993, Cerullo filed a civil action in the US District Court for the district of Colorado in Denver. On August 5, 1994, the Court ordered a settlement of Cerullo's claim. He was awarded \$86 for the cost of the shoes and the recovery of his filing fees. What follows is an estimate of costs to the US taxpayers of the Court proceedings from November, 1993, to August, 1994.

The following costs have been calculated at \$500/hr for judges, \$100/hr for the assistant US Attorney, \$50/hr for BOP staff and \$40/hr for the US Marshals. The costs of court clerks, bailiffs, support staff, US Attorney's office overhead, courtroom building overhead, etc. have not been entered into the cost estimate. Estimates were calculated from the official Court Docket Sheet.

The total time spent by the US Attorney's preparing for and arguing the case; time spent by the Magistrate and Judge reviewing briefs, ruling on motions, and conducting hearings; and time spent by the US Marshals serving court papers adds up to an estimated \$6,850. The transcript of the hearing, at \$50/page, cost \$550. It is estimated that BOP staff time incurred investigating the claim, preparing evidence, writing reports, long distance calls and postage added up to \$1,000.

The total estimated cost to the taxpayers to litigate this claim is a whopping \$8,400. Cerullo would have settled for \$30 in May of 1993 - without going to court.

The story may not have ended there, though. The BOP stated in open court that they preferred to take the case to trial (at taxpayers' expense) rather than settle the Tort Claim themselves, and were willing to appeal the decision all the way to the US Supreme Court. The Judge apparently dissuaded the BOP from appealing the case.

In the above case, the BOP was clearly wrong. They violated their own policies when the guard refused Cerullo's request to

change into work boots. The BOP failed to adhere to the responsibility imposed on them by the Federal Tort Claims Act to settle this minor claim and avoid costly litigation in an already overburdened federal court system.

This case makes it plain that there are two sides to the "frivolous law suit" coin. Who was the "frivolous litigator" in this suit? Cerullo, who would have settled for \$30 to pay for his ruined tennis shoes, or the BOP who insisted on taking the case to court and soaking the US taxpayers for over eight thousand dollars?

Lucasville 1994 "Spilt Milk"

By John W. Perotti

It's been almost two years since the 11-day siege at the southern Ohio Correctional Facility located in Lucasville, Ohio. The problem? "Spilt milk" is just the beginning.

Millions of dollars have been spent on reconstruction of the prison and prosecution of the prisoners that the state said committed criminal acts during the siege. Steel encased control booths with double doors controlled electronically have been constructed in each cellblock with an escape ladder and hatch built in so that the guards can escape to the roof should the security of the double doors be breached. The back walls of the cellblock have been encased in steel so the concrete can't be broken out to get to anyone hiding in the back stairwell. TV cameras have been strategically located outside all the doors and in the hallways to monitor movement. Prisoners are only permitted out of their cells for meals and one hour recreation per day, one range at a time and under constant escort and surveillance by Disturbance Control Teams (Ninja Turtles) guards, dressed in black T shirts and fatigues. This is supposed to instill fear, a psychological tactic when actually they're just trying to dress like us and are stationed in the hallways to quell any disturbances. Prisoners are rushed through the dining hall like cattle, range by range to their cells. Everything is delivered to the cell, there are no passes except for visits, and you're escorted both ways. Young vocal prisoners are set up and placed in the hole, then isolation.

As I was leaving the dining hall the other day three guards attacked a young black prisoner for the crime of refusing to clean up "spilt milk". The prisoner in front of him who spilt the milk offered to clean it up but was told not to. The guard claimed he "didn't like the other prisoner and wanted him to clean it up." When he

refused, he was attacked, wrestled to the floor then taken to the hole.

Myself and eight others were escorted to the hole an hour later. We were placed under "investigation" for merely witnessing the attack by the guards. The news media was told that the prisoner refused to clean up spilt milk. They were not told he wasn't a food service worker, and it wouldn't normally be expected his job to clean it up. The news media was told he attacked the guards while 7 other prisoners cheered him on.

This is typical propaganda by the guards union who have been trying their hardest to have the prison locked down by feeding propaganda and intentional lies to the media and legislators. Attitudes are still a mile high due to the takeover last year.

Forty eight prisoners have been indicted on 198 charges from assault, kidnapping to aggravated murder with death penalty qualifications. Twenty of the prisoners have been found guilty of charges with 8 pleading guilty. Some have even turned state evidence against the others. After the Attica riot 8 Attica prisoners were either convicted or pled guilty, but all were later pardoned by the governor due to prosecutorial misconduct. Prosecutors in Santa Fe New Mexico promised to indict more than 100 prisoners after that riot. Only 30 were criminally charged and early trials ended with not guilty verdicts. There were no death penalty convictions and prosecutors began reducing charges and offering plea bargains.

Ohio hired a team of special prosecutors headed by Mark Peeipmeir, an assistant Hamilton County Prosecutor. The state's strategy has been to bring the lesser charges to trial, obtain convictions based on guards and snitch claiming to be "eyewitness" with known fabricated testimony. The prosecutor wants to use the convictions to plea bargain and obtain state witnesses from the weaker prisoners under indictment. Five prisoners were indicted for aggravated murder with death

Lucasville (cont.)

penalty ability. The state obtained the indictments after a negotiator during the siege agreed to turn states evidence against his fellow prisoners regarding the death of guard Robert Vallandingham when the state failed to take negotiations seriously. This prisoner was described by the media as being one of the leaders of the Black Gangster Disciples (Lavelkle).

My brother, Little Rock Reed, who has served years at SOCF has agreed to assist defense attorneys. Little Rock Reed will help the defense of those Brothers criminally indicted for this takeover. Little Rock has written an article describing how former SOCF warden Arthur Tate advanced violence and the oppressive conditions leading up to the takeover. The affirmative defense of self defense/justification should be an option for the brothers to illustrate the conditions were so oppressive the takeover was necessary to save THEIR lives. Little Rock Reed is presently being persecuted by the Ohio Adult Parole Authority in fear of retaliation from "the system" for telling the truth.

Assistance for the trials can be obtained through The Center For Advocacy Of Human Rights, P.O.Box 880, Rancho De Taos, New Mexico 87557-0880, phone (505) 751-0197. Contact Attorney Deborah Garlin for information, or Professor Lance Kramer, AOC ASSOCIATES, 1321 Autumn Hill Dr. Columbus, Ohio 43215.

On other legal fronts the class action of *Morris v. Voinavitch*, Case No.C-1-93-436 is pending in the United States District Court in Cincinnati, Ohio, Judge Spiegel presiding. This suit deals with all uses of force incurred by guards and prisoners during the siege, inadequate access to the law library and programs, medical treatment, property losses and the lock down in general. Anyone with claims or seeking assistance for treatment at SOCF should write to Alphonse A. Gerhardtstein, Attorney at Law, 617 Vine St., 1409 Enquirer Bldg., Cincinnati, Ohio 45202.

Anyone with specific instances of retaliation due to protected first amendment rights, specific instances of denial of access to the law library, transfers from other prisons to SOCF without advance written notice or hearings, RIB appeals to central office with no decision being made within the thirty day time period should write Mr. David Skidmore, Atty at Law, Vorys, Sater, Seymour, and Pease,

Suite 2100, Atrium Two, 221 East Fourth Street., P.O.Box 0236, Cincinnati, Ohio 45201-0236 Phone (513) 723-4000 who is representing Chryz Knecht, John Perotti and Keith Ledger in *Knecht et al v. Voinavitch et al*. Case No. C-1-94-12 (SD Ohio WD) (Judge Spiegel).

Anyone witnessing or knowing of specific instances of retaliation directed at these prisoners (or with specific instances of being harassed by the Disturbance Control Team) should contact these attorneys, especially Skidmore.

It's up to us to open Lucasville back up. The guards union wants it locked down so all cases of prisoner on prisoner assaults are utilized by them to justify their cry to lock down Lucasville. Let's work together rather than against each other to further OUR goals of opening it back up. Let's put aside petty difference and stand united against them, not each other. Use all legal remedies available: informal complaint resolutions, grievances, suits and legal remedies first. We need the families and friends of those imprisoned to speak to the media and legislators to let them know what is done to us in these Kamps.

Last, those that tend to grumble about how bad it is at Luke now and blame those involved in the take over need to re-evaluate the placement of the blame. Not everyone can file or litigate suits. Some lack the knowledge, and not everyone believes they should accept what is meted out to them in silence. Those Brothers who took a stand did it to bring about change and while it may not have had immediate positive effects, you can believe that it will in the future.

Men cannot be treated like animals and continue to accept this treatment. Blame the prisonrats for initiating the oppressive conditions that caused men to react in desperation. DO NOT blame your fellow prisoners who are paying dearly now for reasonable treatment. They should be looked upon, not with disrespect, but with respect and praise.

Did Warden Seek SOCF Riot?

In April, 1993, prisoners at the Southern Ohio Correctional Facility (SOCF) rebelled in what became the longest prison siege in US history that left 10 dead. *PLN* has provided extensive coverage of the

rebellion, its origins and its aftermath. Some SOCF prisoners have claimed that the rebellion was deliberately provoked by SOCF warden Arthur Tate in an effort to build a higher security prison at SOCF.

PLN recently received a copy of a March 22, 1993, memo, "RE: Request to Construct a Maximum Security Unit at SOCF," sent by Tate to Eric Dahlberg, the Ohio DOC's South Region Director. In the memo Tate reiterates his view that a newer, higher security control unit type prison needs to be built at SOCF to house maximum security prisoners. He states: "I am fully cognizant of our department's inability to finance a serious building project at this time, however, the attached project would require significantly less of an expenditure but create a high security unit that would enable us to more effectively handle inmates requiring this level of security." "...I cannot stress enough our need for a unit of this nature. We are suggesting that this unit be constructed in the existing space formerly known as the death row recreation area in J block."

Conveniently enough, less than a month after Tate wrote the memo the rebellion broke out. Past articles in *PLN* about SOCF conditions indicate that while he was warden Tate continually worsened conditions making the rebellion all but inevitable. Tate's memo indicates there was certainly a motive to do so.

Award for Prisoners Beaten by OH Guards

In April of 1993, the Southern Ohio Correctional Facility (SOCF) at Lucasville, Ohio, erupted in one of the longest, costliest, and most violent prisoner rebellions in recent history. The rebellion brought Lucasville to national attention, but Ohio prisoners and prisonrats had long been aware of problems leading up to the outbreak of violence. [See: *What's Wrong With the Ohio DOC*, by John Perotti, in the Feb. 94 issue of *PLN*, and *Lucasville: A Brief History*, by Perotti, in the Dec 93 issue] In September of this year a federal jury awarded a large settlement to two Ohio prisoners who were beaten by SOCF guards.

According to testimony of former guard Ron Tawney, the beating was a typical "attitude adjustment" for new prisoners assigned to J block who "act cocky." Tawney said that it was well

known among guards at SOCF that "J2 is a spot where the officers can get theirs."

The defendants in the suit were guards Jerry Webb, Ralph Miller, Paul Duke, Lt. Chad Riggs, and former guard Stanley Lane. Tawney and Lane administered the actual beating, but Tawney was not a defendant in the civil action because he had already settled his part of the suit out of court.

The incident occurred in September of 1989, when prisoners Danny Lee Grimm and Gary W. Bennett were transferred to SOCF for disciplinary reasons after an escape attempt at another Ohio prison. Tawney testified that he and officers Webb and Miller decided the two prisoners an "attitude adjustment" and all agreed that he and Lane would "teach them a lesson."

Riggs, a Sgt. at the time of the beatings, was supervising the other guards. He encouraged Lane and Tawney to teach the newcomers a Lusasville lesson. Tawney and Lane used their nightsticks and fists to beat the shackled prisoners after knocking them to the floor of their cell.

Within days, the prisoners filed formal complaints. Prison and state officials investigated the charges. Tawney testified that he and the other guards involved in the incident agreed to deny everything. Tawney said that a union steward urged him, "If you did do it, lie about it."

The guards' "code of silence" held throughout the investigation, but Tawney and Lane were nonetheless fired and fined \$100 each in Scioto County Court for disorderly conduct. Earlier this year Tawney had a "change of conscience," settled his part of the civil suit out of court for \$2,000, and testified against the other guards.

The assistant A.G. assigned to the defendants, Marianne Pressman, conceded that Lane and Tawney had used "excessive force" against the prisoners, but declined that the other four guards had anything to do with it. She attacked Tawney's credibility, asking the jury if they should believe Tawney, an admitted liar, or the four guards who had been exonerated by the prison's initial investigation.

The jury returned an award of \$490,800 to the prisoner plaintiffs. Each prisoner was awarded punitive damages of \$15,000. In addition, Grimm will receive \$75,000 and Bennett, \$115,800 awarded for injuries and emotional distress.

"They got four innocent men," Lt. Riggs said. "It's unfair."

Jurors interviewed after the trial explained "The defendants just weren't believable. They were confused, and they

couldn't keep their stories straight. They hung themselves."

The two prisoners, Grimm and Bennett, have since been transferred to the Mansfield Correctional Institution (MANCI). Nothing is known about the reception they received there. The defendant guards, Webb, Duke, Miller, and Lt. Riggs still work for the Ohio DOC, and are still employed at SOCF, Lucasville.

Sources: Columbus Dispatch 9/21/94,
Cincinnati Enquirer 9/13/94

News in Brief

WA: Since June, 1994, 8 prisoners at the Clallam Bay Corrections Center (CBCC) were placed in segregation after they allegedly gave friends and relatives a state toll free number at which to call them. The DOC operates a boiler room operation at CBCC which contracts with other state agencies and private businesses to do phone work. The Department of Ecology operates a toll free phone service at CBCC which employs prisoners to answer basic questions about the state's emissions control program. The line receives 10,000 calls a month at 62 cents a call. Prison investigators are trying to determine how many prisoners received calls from friends and relatives and for how long. Given the fact that the Washington DOC charges its captives extortionate phone rates it is hardly surprising that prisoners would seek to cut their families phone bills... **NY:** On November 7, 1994, four prisoners escaped from the Wallkill maximum security prison. One tried to walk out the front door and was caught, three others escaped by climbing over the fence. All three were caught within a matter of hours, barely conscious due to blood loss from razor wire cuts. All four prisoners had been housed in the control unit section of the prison when they escaped. **MT:** State prison chief Mickey Gamble resigned from his post on November 3, 1994, after he took three prisoners to dinner as part of a prison program that rewards good behavior by convicts. Gamble resigned rather than be fired. Word of the dinner was made public after a high school teacher of one of the three female prisoners saw them in a Helena restaurant. Governor Marc Racicot said Gamble's decision to take the prisoners out to dinner "went beyond the bounds of propriety. It ignored the interest of the victims." **GA:**

On August 5, 1994, FBI agent Danny Scott was charged with vehicular homicide in Atlanta, GA. He was also charged with obstruction of justice and leaving the scene of an accident. Scott was allegedly drunk driving when he killed a pedestrian. Scott has prior drunk driving convictions. **MI:** Detroit policeman Ron Davis, a 17 year veteran, was caught robbing bank a few hours before going to work. Using his police issued gun and a ski mask, Davis walked into a bank, gave the teller a note demanding money. The teller gave him \$1,000 and he fled with a security guard in pursuit. The guard caught him and held him until non-bank robbing police showed up. **PR:** On November 6, 1994, Puerto Rico voters rejected constitutional amendments to limit the right to bail for criminal suspects and to expand the Puerto Rican supreme court. **St. Kitts:** Protesting the release on bail of two of the prime ministers sons, accused of weapons and drugs charges, all 150 prisoners in this tiny island nation protested and broke out of prison on November 11, 1994. The nation's 300 man police force requested help from the armies of neighboring countries to help round up the escaped prisoners. The riot began an hour after the two sons' release. Prisoners threw eating utensils, benches, buckets and pans over prison walls onto city streets causing all 12 prison guards on duty to flee the prison. Police fired plastic bullets and tear gas into the prison yard and two hours later the prison was set on fire and prisoners broke out to continue their protest in city streets. Bail on weapons and drug charges are extremely rare in this country and non-prisoners have also protested **Kazakhstan:** On September 9, 1994, three prisoners used a paperclip to pick the locks on their handcuffs while being transferred between jails. Once free of their handcuffs the prisoners overpowered their guards, took their assault rifles and shot them, leaving two guards dead and one injured. The prisoners escaped into the wilderness but were caught within a few hours. **Russia:** Pretrial detainees in Moscow's oldest prison, Butyrka, went on a one week hungerstrike on September 8, 1994, to protest overcrowding, bad food and a lack of mattresses and blankets. Cells designed for 30 prisoners typically hold over 100. Many prisoners are held in these conditions awaiting trial for more than five years.

Notes From The Editor

by Dan Pens

Keeping these twenty pages filled and mailed out to 1,200 readers is no small task. Each month I mail out about 50 letters, 75 post cards and a dozen or so invoices to *PLN* subscribers. I generate most of the "routine" correspondence. Paul answers most of the personal and business oriented mail. He sends out as much or more mail as me.

Every business day another batch of reader mail arrives from our P.O. Box in Florida. If we only get one piece of mail a year from 1,200 readers... well, you work out the math I keep several piles of letters, magazines, newsletters, half-written articles, clippings, submissions by readers, and wire-service clippings in my cell. If I try and kick back and take it easy for a day or two, the piles tip over and I have to start pulling the plow again.

We have corresponded with others in the small press trade. Most have said that when the mailing list reaches about 1,200 you either cut, fold or get your act together. We're in the process of getting our act together.

Thanks to a generous grant from the Paradam Foundation, who made no demands on our editorial content, we have been able to purchase a new computer and laser printer for a left coast volunteer and a scanner and OCR software for a volunteer back East. Paul and I write the articles here in our cells. We mail the copy to volunteers "out there" who scan it and desktop publish it. All of the scanning and DTP has been handled by one volunteer. We now have two volunteers to do the scanning, and three volunteers to do DTP; each will do every third issue.

The mailing used to be handled by East coast volunteers. Peeling and sticking thousands of labels each month, bundling and sorting the stuff according to strict postal guidelines, and going to the post office was getting to be quite a chore. Starting with the February issue the printer will handle all of it. But like all good things in life, it costs money. And yep, here's your favorite part of the Editorial - where we exhort you, our faithful readers, to keep them checks and postage stamps coming.

Although we got the Paradam grant to help us purchase hardware and software (one-time expenses), we remain committed to being entirely "reader supported."

The motto on our masthead is "Working to Extend Democracy to All." Well, if you know anything about how "democracy" works in this country, you appreciate the fact that elected officials do not dictate policy. That's right. They need money to get elected. Over \$30 million was spent by two candidates for a California Senate seat. Where do politicians get this kind of money? And who do the winners "represent" now? The individuals and interest groups who ponied up the money are the ones who call the shots for the next six years. That's "democracy." Which brings me back to this "reader supported" thing. Our fixed costs (printing, mailing, postage, office supplies, etc.) approach a thousand dollars per month. As long as we're able to raise that money from our readers, then it's our readers who call the shots. If we ever get hooked up to some kind of regular grant money to cover our operating expenses... and, if like politicians, we need that money to operate... the ones who pass out the cash are the ones who start making "suggestions" about our editorial content. A recent grant proposal was turned down because the foundation (RESIST) disagrees with some of our editorial content. Fine. They keep the money, we keep our independence.

So if you value the issues of *PLN* we mail you each month, remember to hustle up what you can to send back to us. One final note on that. A lot of prisoners, especially the ones in ad-seg, super-max, or in states where there are few or no legitimate paying jobs, have trouble sending even a few stamps. If that's the case, and you want to keep getting *PLN*, drop us a post card or a letter. Explain what your situation is (in 100 words or less) and let us know that you want to be extended. If you care about it enough to at least drop us a line, we'll carry you for another six months or a year.

One of the never ending chores that keep us occupied, is beating back the forces of censorship. In July *PLN* was permanently banned in North Carolina prisons by Lynn Phillips, the DOC Director. After a flurry of correspondence, affidavits, grievances between us at *PLN*, our readers in North Carolina, the North Carolina ACLU, DOC and AG's Office, they realized the error of their ways. Prisoners in North Carolina don't have "In-

mate Law Libraries" so their reliance on *PLN* for relevant case citations is especially critical. But this was just one case. We have had the same censorship battles with Washington, California, Texas, Wisconsin, New Jersey, Indiana, and have weathered minor skirmishes with a number of other states and principalities (individual prison mail rooms). Each struggle requires time, energy, and a lot of letters to ensure that our rights to publish and the rights of our readers to receive *Prison Legal News* prevail.

If you are a prisoner and miss an issue, check with your mail room. Let them know that you expected an issue of *PLN*, but you didn't get it. You should always get each month's issue by the end of that calendar month. If you miss two issues, write us and let us know. We'll check into it. The first step is to send you back a letter, first class postage. If that gets to you, which means we have your correct mailing address, then the next step is for you to file a grievance. If you can't resolve it on your end, our office manager in Florida will mail you an affidavit stating that such-and-such issues of *PLN* were duly mailed to you at such-and-such an address. This, along with a reminder to the prisoncrats of your rights to receive legal publications, and some inquiries by the local ACLU or other activist organizations, is usually enough to clear up whatever the "problem" was.

Lastly, if you'd be willing to help spread us around a little bit, send 10 stamps to cover the postage and we'll mail you a bundle of 25 *PLNs*. Pass 'em out at meetings, drop 'em off at your local law library, or whatever you think might help us reach our "target audience." We'd appreciate your help getting us more well known. We know there are more readers out there who would like to subscribe, we just need to get that first issue in their hands. Thank you for supporting us. As long as you need us and appreciate what we do, we'll keep on doing it. Enjoy this issue, pass it on when you're done.

Algerian Prison Uprising

On November 13, 1994, 700 fundamentalist Muslim prisoners on death row, joined by 100 other prisoners, seized control of the Berrouaghia prison for several hours and tried to take guards hostage. The prison, located outside the capital of

Algiers, holds several thousand prisoners. Many of the prisoners are members of the Islamic Salvation Front which has been battling the military junta that took power after the Muslims won the 1991 elections held in Algeria.

The prisoners were armed with knives and set their cells, beds, kitchen and nursing room on fire. Prison guards stormed the prison and retook it in a hail of gunfire that left 8 prisoners dead and 58 wounded. Two guards were reported injured. This follows on the March, 1994, jailbreak by several hundred prisoners in the Tazoult prison, see: *PLN*, June, 1994.

Japan Uses Prison Slave Labor

While the use of prison slave labor by China has been widely criticized by the US, less well known is the fact that Japan also has a similar system. In July, 1994, congressman Gary Ackerman (NY Dem), head of the foreign affairs subcommittee on Asia, told reporters that Japan should account for all goods produced under its system of forced prisoner labor and halt the practice. Ackerman said that forcing prisoners to work more than eight hours a day violated the International Labor Organization's conventions.

Japan bans the export of its prison produced goods to the United States but not to other countries. Thus, there is no way of knowing whether prison goods enter the US through third countries.

Japanese prison slave labor practices were reported to Ackerman by Christopher Lavinger, a constituent who spent 16 months in a Japanese prison. Lavinger claims he was forced to make shopping bags with trademarks for Mizuno Sporting Goods, Burberry's of London and Japanese department stores. He also made pinball machines, electronic devices and toys. He was paid three to twenty cents an hour. Ackerman said "Companies that participate in this type of program are promoting indentured servitude." Not mentioned by Ackerman is the fact that the US engages in similar programs of exploiting prison slave labor and exports prison made goods [See *PLN*, Vol. 5, No. 5.]



READER MAIL

[One of the objectives of PLN is to become a forum through which readers can express opinions on what they've read, or to point out issues we should be addressing. Paul and I feel it is important for there to be a dialogue with our readers, especially around matters of disagreement. We are not above criticism, nor do we claim to have all the answers. So give us your feedback and we will print as much of it as there's space for in our letters section.]

CT's "Gang" Problem

The RICO concept of guilt by association has recently moved from the statute books and has now made its appearance into prison management. Within the past year or so Connecticut's Department of Corrections adopted a gang management policy. The policy designates gangs and gang members, and implements a particularly draconian housing and management policy for prisoners so designated. However the policy has recently come under attack in state court as being illegal with respect to one aspect, and that is the exemption of prisoners designated as gang members from being eligible to earn statutory good time.

Previously all an prisoner in Connecticut had to do was not receive any disciplinary tickets and good time would automatically accrue at the rate of ten days per month per statute. The only way an prisoner could lose good time was for discreet acts of misconduct, and then a fixed number of days would be deducted from the good time already earned. However under the gang policy, gang members are not allowed to earn good time for an indefinite length of time.

The DOC claims that being a member of a gang is akin to a "continuing ongoing violation" of the rules, and therefore no good time should be credited. However, gang membership is not easy to prove nor disprove, nor is its inception or cessation accurate to pin down, even for the so-called gang member who unfortunately will remain in statutory limbo until the DOC decides to release him/her. At a minimum an prisoner designated as a gang member in Connecticut should ex-

pect to lose good time for a year or more under the current policy.

Prisoners in Connecticut have few rights afforded above the minimal federal rights. However, one thing they do have a right to is good time per statute. Furthermore, the statute has been interpreted by the Connecticut Supreme Court as forbidding the DOC from taking away good time that has not actually been earned. The legal challenge made by an prisoner in Connecticut is that by exempting him from being able to earn good time for an indefinite amount of time the DOC has in effect taken away good time that he has not yet earned. If the court rules in the prisoner's favor it will affect several hundred prisoners in Connecticut. We'll keep you posted.

William Dwyer, Attorney.

Resource Info Wanted

I am in the process of compiling information for a prison resource directory. Send any info that you feel would be of benefit to prisoners, their families, ex-offenders and those working in the criminal justice arena. Any type of info can be used, i.e. legal services, educational services, medical services, support groups, magazines, newspapers, newsletters, etc. Any type of information that a prisoner could use will work for this directory.

This directory is for prisoners and their families. I hope to expand it in the future to have a section that prisoners can sound off in. Send your info and let me know if you would like to be contacted when the project is done. [Editor's Note: *PLN* will plug the directory once it is completed and available for distribution.]

Send submissions to: RAID (Resource Assistance Informational Data) Directory, P.O. Box 1, Milton, WI. 53563.

From a Michigan Reader

I was curious as to how you get your stories. They are very interesting, and that one in the Sept. issue about Emmett Jones and jury rigging in Michigan really hit close to home. I might have a story for you. I recently got fired from my job as prison law library clerk for assisting another prisoner in pursuing his appeal.

They've come out with their own little memorandum that prison law library clerks cannot assist other prisoners in any way. They have put me on detention for twelve days specifically for this. The man I was trying to help doesn't even have a G.E.D. His conviction was affirmed in the MI Court of Appeals, and as a matter of course his appointed appellate attorney sent him an application to the MI Supreme Court, told him to fill it out and abandoned him. Basically, they are trying to stem the free-flow of information in the law library here, impeding and penalizing prisoner law clerks who try to help other prisoners. I am not the first one here who has gotten fired for this, even though it's a relatively new inter-prison law library rule. However, this rule has been approved by the M.D.O.C. in Lansing, or so I am told. That being the case, it could be a new trend in this state.

Anyway, that's the gist of it, and I believe it to be an insidiously clever form of oppression because of the numerous illiterate and semi-literate people they have locked up. I've been preparing to take this issue to the courts, and I must tell you, your little story [in the Emmett Jones article] about Baraga "Super-Max" was a little disheartening. Michigan has no problem being deceitful and corrupt in order to get their way. I've seen enough of this to know. I have to do what I believe in, though, so I'm getting ready to strap it on - my armor, that is.

H.M., Kincheloe, MI

From a California Reader

Governor Pete Wilson is constantly passing legislation that is cutting away at the Prisoner Bill of Rights, and has done away with conjugal visits for prisoners with certain sex convictions, and has recently signed a Bill that limits good time/work time credits to 15% (down from 33.3%-50%) for prisoners with violent convictions and some sex convictions. I have not heard if he was going to try to make this retroactive, but I don't think so because *ex post facto* would preclude doing so.

The California Department of Corrections (CDC) is currently putting a policy into effect that would require charging prisoners a \$5.00 fee for all "nonemergency" medical services. I believe this

can be defeated in light of other cases concerning this issue, i.e. *Collins v. Romer*, 962 F.2d 1508, wherein a \$3.00 fee was unacceptable.

CDC currently has a "zero tolerance" indigency plan, i.e. if you have any money on your account you are not entitled to postage-paid envelopes, paper, pencil, etc. I am currently preparing a Civil Rights Action (42 U.S.C. §1983) challenging this policy, in light of the holdings in *Casey v. Lewis III*, 834 F.Supp. 1553, where the U. S. District Court of Arizona, addressing indigency, held that even making prisoners choose between obtaining hygienic items and legal materials was unconstitutional, and I will use the fact that prisoners here also will be charged \$5.00 for medical services and a \$3.00 surcharge for filing any litigation. [See also: *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991), and "AZ DOC Denies Court Access" in *PLN*, Vol. 5, No. 5]

I am also attacking the Tuberculosis Testing Program here, as I believe it is flawed and inadequate. Additionally, I am attempting to achieve the removal of mentally ill prisoners from the general population (for the sake of as well as for the sake for other general population prisoners) so they can be housed in a medical facility and receive the care they need.

R.B., California

Activists Labeled "Security Threat"

Being labeled as a "Security Threat Group" (gang) means anyone that is organizing and whose actions are considered disruptive to the prison system. For the most part the state [OH] is not focusing on real gangs, but rather focusing on prison activists and jailhouse lawyers. Every activist and jailhouse lawyer I know has been labeled as a Security Threat Group (STG). So basically its focus is to repress the movement struggling for prisoners' rights and prison reform.

In my case I was helping to organize a letter writing campaign to state legislators in opposition to Ohio's super max prison. The Rules Infraction Board here determined that my activities were "organized" and "disrupted" the legislators! That was it.

In speaking with the Gang Coordinator here, I was told that gang activity (SGT) includes anything prison officials

deem to be a problem for the Department of Corrections.

D.C., Lebanon, Ohio

U.S. Prisoner in Thailand Needs Info

I was arrested in June of 1991 and charged with possession of narcotics and intent to export. The drugs weighed slightly more than five kilos. I was given "legal counsel" - I think. I was told by a man who spoke very little English, "Plead guilty. If not plead guilty I guarantee you get death sentence." I never saw the man again.

Apparently, I was tried by "due process." I was taken to a room where three men were sitting behind a desk. They literally screamed at me in Thai, which I did not understand. I was then taken downstairs and placed in a cell by myself. One of the guards told me I had received a life sentence.

Does the U. S. government recognize or acknowledge a sentence or verdict handed down by a tribunal, in effect a court martial? Thailand was under martial law at the time of my arrest. As a first offender, what length of sentence would I have received under U.S. law? I would like to know both the maximum and minimum sentences and the time I could reasonably expect to send in the U.S.

What is the usual or average length of time that U.S. citizens convicted abroad stay in the arresting country? Are there any special considerations concerning parole or specific conditions concerning the act of transfer to the U. S. ? We have been told several things concerning the transfer itself. The disturbing part is that we must waive the right to a re-trial, and if we do not waive this right we will not be transferred. Why must we waive any rights at all in order to return to our own country?

We are told by the State Department that one year here is equal to four years in the U.S., yet I have also heard that the Department of Justice considers the time served at a ratio of 1:6. Can this be clarified by written reference?

Would you please pass on my name and address? I'm sure you probably know, mail (indeed any contact with the outside) is vital to our survival and rehabilitation. If possible, could you send sev-

eral sets of any information or answers you mail to me. There are 14 Americans in this prison (70 in Thailand) and we are divided among six buildings. We are all concerned with these issues, but nobody seems to be able to get any straight answers.

William A. Lindahl
Bangkwang Maximum Security Prison
Building 3
Nonthaburi, 11000, Thailand

Conditions in Thai Prisons for US Prisoners

Right now there are 31 American women and approximately the same number of men incarcerated in Thailand prisons on drug charges. Justice and impartial legal representation are not part of the equation here. Trials take years; guilt is assumed upon arrest. You can't win even if you are innocent. There are Americans here who have even received the death sentence! Some people didn't even have drugs in their possession, and most of us are first time offenders.

The USA has enforced a limitation that bans anyone having more than one kilo from ever using the treaty, and Thailand has a mandatory minimum length of stay enforced on us: eight years for those with a life sentence (most of us were sentenced to life) and four years for those with a lesser sentence.

Conditions are horrendous. Treatment is barbaric, and the language barrier is almost insurmountable. Imagine sleeping quarters like cattle holding pens. This is a "pay as you go" prison. Nothing is free, not even food, soap, or toilet paper. Mental health care for severely disturbed people like paranoid schizophrenics consists of exorcism. Yes, exorcism is still considered a valid medical treatment in Thailand. For example, this past week a poor hill tribe woman who has been suffering from vivid hallucinations and exhibiting spontaneous bleeding from the nose, ears, mouth and eyes. A monk was brought in to help exorcise the demon from her body. Can you believe this? Yet when we need antibiotics for the frequent infections we get because of the filthy environment we live in, it is like pulling teeth - which is, by the way, what the dentist would rather do than fix your teeth.

Probably the worst thing we American prisoners are suffering from is the culture

differences and isolation from our own people and country. For we women in particular TV, newspapers, music, and radios are forbidden. There is no form of rehabilitation here. We are expected to work in the prison sweat boxes, yet we have to buy everything we need here.

Mainly Americans should be aware of what is going on here, but most of all we need your support -even if it is just a letter. We are hoping that our shared circumstances (incarceration) will give some of you a special understanding for what we are going through. Please, we welcome friendly letters and would also like to try and get a letter campaign going back home (we are only allowed to send out three letters a week) to get the USA to repeal the "1 Kilo clause" and to push Thailand to remove the 4-8 year mandatory minimum length of Thai incarceration.

Readers can respond to:
Diana Smith Nwankwo
-or-
Jackie Lynn Sample
Ngam Wang Wan Rd.
Bang Khen, Bangkok 10900 Thailand

Televisions in Prison

Your article, *Prisons TV: Luxury or Management Tool?* [Vol.5 No.9, Sept. '94], raises an issue that has been debated by myself and some other prisoners here in Wisconsin. I believe that Wardens and others within the DOC have a perception that televisions are assisting them in minimizing static and disruption. DOC officials believe that by permitting televisions, they are in possession of a tool by which they can use to pacify the prisoners into conforming - rather than concentrating their efforts and time in fighting these people legally, educationally, and otherwise.

I believe that television can consume a man who is forced to live in a prison cell all day and all night. I agree that rather than read a law book or study math, most men in prison simply sit in their cells glued to the TV set - probably believing much of what he hears and sees.

I defy anyone to prove to me that thirty years ago, when prisons did not allow television sets, that the prisoners were any more educated, intelligent, or non-passive. It's a matter of choice. A prisoner who wants to read and learn and study will. One has to make these choices.

People who believe that removing television sets from prisons would make the prisons a better place, or that prisoners in those joints would be better educated, more informed and less passive, are only fooling themselves. The problem isn't with the access to a television, the problem lies with the men and women watching them rather than learning what their rights are.

Those who champion removing the televisions from prisons can rest with the knowledge that they are championing a cause supported by Clarence Thomas, Bob Dole and Tommy Thompson. Tommy Thompson is the extreme right-wing Governor of Wisconsin who just ordered the weights removed from all WI prisons, and who ran '94 reelection ads stating that televisions are next to go. I question anyone who agrees with Thomas, Helms or Thompson.

C.Y., Waupun, Wisconsin

AIDS Info Sought

Hi, my name is Jeannie Pejko and I am a former prisoner, having spent five years in Dwight Penitentiary in Illinois. I live in Chicago and work with the AIDS Coalition to Unleash Power (ACT Up), an organization fighting to end the AIDS crisis. ACT Up/Chicago's Prison Issues Committee is currently working to put pressure on the state of Illinois to improve its AIDS services in state prisons. An integral part of our campaign is gathering input and information from prisoners. I would greatly appreciate it if you would write to me and let me know what the situation is in your prison.

Any information you have about AIDS in prison will be useful, particularly about education programs, support groups, prisoner led programs, drug treatment programs, medical care, pre-release programs, etc. We are interested in the availability of medical treatment and in how prisoners with HIV/AIDS are treated by other prisoners and by staff. We can also provide prisoners with information on safer sex and medical treatment issues. Please let me know if there is any particular information you need and I'll do my best to get it to you. Confidentiality in all areas will be respected of course. Write:

Jeannie Pejko
4624 N. Hamlin
Chicago, IL. 60625

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Contract With America = Contract On Prisoners

By Paul Wright

In late September, 1994, while running for Congress Republican congressional candidates signed Newt Gingrich's "Contract With America" which included detailed proposals in the form of draft legislation to modify federal criminal law in important respects. It is dubbed the "Taking Back Our Streets Act." While nothing is really new in that most of the proposals have been made in the past, they were usually stripped from legislation that passed. With control of both

houses of congress it is very likely that all or some of these proposals will make it into law. Given Clinton's opportunism and own fascist tendencies it is unlikely he will veto any "anti-crime" legislation that makes it to his desk, after all, what moneyed interests are opposed to it?

The bill's provisions on habeas corpus would impose a one year time limit within which to seek federal habeas relief for a state conviction. The limitations period would run from the last of the following: "(1) The time at which state remedies are exhausted. (2) The time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such state action. (3) The time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable. (4) The time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

Federal prisoners seeking habeas relief would have a two year time limit to do so. Proposals made by Republicans in "anti-crime" legislation in 1993, which would abolish federal habeas relief for state prisoners, has not yet resurfaced. The current proposal does include special provisions for state habeas petitioners under a death sentence. Such prisoners could only obtain one stay of execution and if they do not succeed in their first round of federal habeas petitions further stays would be barred unless a few limited circumstances were present.

The bill would expand the "good faith" exception to the fourth amendment exclusionary rule. First announced in *U.S. v. Leon*, 468 US 897 (1984), the exception now applies when police seize evidence based on a valid search warrant that is later found to be defective for one reason or another (say the police omitted facts or perjured themselves getting the search warrant). The proposed legislation would not allow the exclusion of evidence in federal court on the ground that the search and seizure that produced it violated the fourth amendment "if the search and seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances." The bill would also prevent federal courts from excluding evidence seized in violation of statutes, administrative rules or regulations or rules of procedure unless the "exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority." This essentially nullifies the fourth amendment and allows the use of evidence obtained with a warrant whether or not the warrant is valid, accurate, etc. and strips the courts of the power to decide such issues. The constitutionality of this provision is dubious as it seeks to replace the judgment of the courts in interpreting the constitution with that of congress.

The proposed legislation would set mandatory minimum sentences of ten years for anyone who uses or discharges

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a firearm if the underlying violent or drug crime can be prosecuted in state court. It would also forbid probation, concurrent sentences or any type of early release during the sentence imposed for the gun charges. This law would add to the multitude of state and federal laws already criminalizing the use of firearms in criminal activity.

The legislation revisits the recently passed federal crime bill [PLN, Vol. 5, No. 12]. It would make restitution mandatory for all defendants convicted of federal crimes. The crime bill made it discretionary and allows a trial court to consider the defendant's ability to pay, financial needs, etc. The proposed change would order restitution in the full amount and "without consideration of the economic circumstances of the offender."

The proposed legislation would seek to eliminate all the money provided by the last crime bill to drug courts, local crime prevention, police recruitment, etc. for a total of \$5 billion. The money would instead go to hire more police (in addition to the \$8.8 billion already allotted for this) and allow schools to apply for grants to hire police, install metal detectors, etc.

It would significantly change the allocation of money for prisons in the last crime bill. Raising from \$7.895 billion to \$10.499 billion the amount spent over six years on state prisons. The money could no longer be used for boot camp or alternative prisons. The criteria for states to get the money would be shortened so that a state had only to provide assurances that since 1993 it had increased the number of "violent offenders" sent to prison; increased the average prison time actually served in prison by "violent offenders" sentenced to prison and increased the percentage of sentence to be actually served in prison by those sentenced to prison.

In an effort to limit state prisoners' access to the courts they seek to modify 42 U.S.C. § 1997, the Civil Rights of Institutionalized Persons Act, which would require the exhaustion of state remedies before a state prisoner could file suit under 42 U.S.C. § 1983. They would also change the law so that prisoners and employees would no longer be required to have an advisory role in formulating, implementing, and operating prison grievance systems, and courts would be

empowered to dismiss prisoner § 1983 suits upon being satisfied "that the action fails to state a claim upon which relief can be granted or is frivolous or is malicious."

We are sure that once this legislation hits the floor there will be a rapid "bidding war" to see who can be more draconian and more fascist in their proposals. Along with prisoners and

criminal defendants single mothers, immigrants and school children are also on the Republican hit list. So what do all these groups have in common? They're poor, tend to be disenfranchised and don't have a voice anyone with power in this country has to listen to. So the sky's the limit. PLN will provide updates on the legislation as it progresses. ■

From The Editor

By Paul Wright

Welcome to another issue of PLN. In the September issue I asked what readers thought of our *News in Brief* column and whether we should keep it or eliminate it. About 20 readers responded and all want to keep it, no one voiced any opposition to retaining the column so we'll be keeping it. I'm pleased with this outcome as I kind of like it.

A lot of our readers send us newspaper clippings on prison related developments in their area and we greatly appreciate this, a lot of our stories and news items come from these clippings. If you send us clippings please make sure that the date of publication and the source are noted on it, without the date we have no way of knowing the timeliness of the material and the source is important too. Please keep the clippings coming.

Starting with the next issue we will have a new article submissions box that will run in every issue. Throughout our existence we have sought to encourage our readers to submit articles for the simple reason that it is impractical for Dan and I to write everything in PLN nor do we want to. We want our readers to participate in the process as well. We

occasionally get letters from readers asking "why don't you have more articles about what is going on here in this state." More often than not it is because no one is submitting articles about events in that state nor sending us clippings or other information about local developments. You will note that we have fairly consistent and good quality coverage of events in a number of states. That is because we have folks who regularly contribute articles on local developments that are of interest to a national audience.

We are especially interested in news articles about prison struggle because it is either ignored by the corporate media or they only report the DOC or BOP versions of events. We also want legal research articles covering one topic, such as William Van Poyck's article on page 1 of the last PLN. Over the years I have usually written the legal research articles in PLN that focus on a legal overview of the relevant case law on a particular issue. I enjoy doing so but such articles are extremely time-consuming to write, requiring many hours of research. We encourage our jailhouse lawyer readers to submit such articles as they provide a good starting point to prisoners litigating such issues, especially those locked down in control units with no law library ac-

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Mail your submissions of articles and letters to Paul Wright #930783 or Dan Pens #279308, P.O. Box 777, Monroe, WA 98272. If you are located in Europe or the Middle East, send financial contributions to Solidarieta Proletaria, C.P. 17030, 20170 Milan, Italy. Readers in Latin America or elsewhere can send their PLN donations to Arm the Spirit, P.O. Box 6326, Station A, Toronto, Ont., Canada M5W 1P7.

From the Editor (continued)

cess. For every article that we publish on these issues we will give the author a one year gift subscription to *PLN*. If you have any questions please write. Potential legal topics we would like to cover in future issues are: law library and court access; disciplinary hearings, qualified immunity, injunctive and declaratory relief, statutory litigation (i.e. ADA, FLSA, Title VII, RFRA, etc.) and international law on prisoner rights litigation. To get an idea of what we want in terms of article length, etc. just look through back issues of *PLN*.

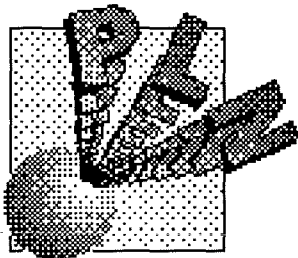
As we go into five straight years of publication and continued growth we are getting more quality input from readers (i.e. article submissions, copies of legislation, news clippings, etc.) across the country and we are becoming more of a prison struggle network. This is a direction we would like to take. We want more input from readers so that we are less the originators of legal and political analysis, commentary and news and are more the distributors of it. We think that participation is important because we want *PLN* to be a publication that affects reality rather than just reports it.

As mentioned below we are doing sample mailings to reach more people. I would especially like to ask our prisoner readers to help let folks know about *PLN* and encourage them to subscribe. Due to the spread out nature of the American prison system we have a hard time reaching prisoners. To do so we need your help. Let others know about us, we can send you *PLN* flyers and bundles of 25 copies to pass along (it would help if you send us 10 stamps to offset the postage costs) to potential readers. We think that we offer information that all prisoners should be aware of, namely what your rights are, what is being done for and against your interests, etc. So posting our flyers on bulletin boards, in law libraries, mess halls, in prison papers, etc. are all good ways to get the word out. We were just hit with two back to back postage rate increases (postage is now our second biggest expense after printing) and the only way we can keep our costs down is if we increase our subscriber base. By reaching more people, especially those in prison, we also increase our effectiveness and impact.

In the December, 1994, editorial I thanked the Peradam foundation for their generous grant which allowed us to purchase much needed computer equipment to use in the desk top publishing of *PLN*. In December they gave us an additional grant of \$1,500 which will be used to fund our outreach mailing to several thousand public defenders, prison law libraries, prisoners and other potential subscribers. Such outreach mailings help us reach more people and increases our institutional subscriber base which in turn will allow us to increase our number indigent readers. We believe that this is a strategy that puts the extra money into expanding *PLN* while we remain self sufficient in terms of our regular operation. This ensures we do not become reliant on grants or such to publish which we believe is crucial to ensure *PLN*'s long term survival and independence. We would like to extend our sincere thanks to Peradam once more for their generous donation. Their recent donation will allow us to do supplemental mailings for an entire year.

I would also like to remind readers that *PLN* is a § 501 (c)(3) non profit organization and all donations are tax deductible. Many companies will make a matching grant if an employee makes such a donation. In past issues of *PLN* we thanked one of our readers, Ellen Spertus, who generously donated several copies of Microsoft software to *PLN*. This has greatly improved our computer operations and on top of that Microsoft made a matching gift contribution as well. So again, thank you Ellen and Microsoft.

Don't forget to tell friends, family members, etc. about us as well. Please help us expand our subscriber base. Enjoy this issue of *PLN* and pass it along to others. ■



FL DOC Industries Fined

On June 16, 1994, the Occupational Safety and Health Administration (OSHA) issued a citation against Pride of Florida, Inc., the profit motivated corporation that runs many of Florida's prison industries, for safety violations involving safety toe shoes not being issued to prison workers at the Pride Heavy Equipment Renovation Plant at Tomoka Correctional Institution. The citation was the result of a formal complaint concerning safety violations at the plant filed by a former Tomoka prisoner and Pride worker who was fired in 1993 for refusing to wear non safety toe state issued Brogan shoes.

The violation was deemed "serious" by OSHA and a \$1,100 fine was imposed against Pride for the safety shoe violation and another \$1,100 fine was imposed for a machine safety violation found during the OSHA inspection. Pride was given until August 2, 1994, to correct the safety toe footwear violation.

Information about workplace safety rights and how to file a safety complaint may be obtained from: US Department of Labor, OSHA, 1851 Executive Center Drive, Suite 227, Jacksonville, FL 32207. ■

Reprinted from: *Florida Prison Legal Perspectives*.

Immigration Detainees Rebel

On November 14, 1994, 100 illegal aliens detained at the Federal Corrections Facility in Eloy, AZ, rebelled to protest bad food and onerous prison restrictions. A prison spokesperson said the detainees were "carrying baseball bats when they came into the cafeteria for supper." It took prison officials about two hours to suppress the prisoners and restore "order." There were no reports of injuries or how much property was damaged. In October, 1994, the detainees at Eloy had rebelled over bad food and excessive restrictions on their movements. The detainees are illegal aliens held in a medium security prison for the Immigration and Naturalization Service (INS). ■

PA Limits Suits Against Defense Attorneys

by Dale Gardner

The malpractice suit against her was "a mere buzzing fly," said Patricia Dugan, a criminal defense lawyer in Philadelphia, PA. So rather than contact her insurance company and watch her rates rise she asked a friend to handle the case.

Her instincts were correct: the Common Pleas Judge swatted away the suit. It had been filed by a prisoner for whom Ms. Dugan had brokered a plea of one drug count down from four, but was sued after receiving a stiff sentence that was not agreed to in the plea bargain hearing. In addition to having the suit dismissed, Ms. Dugan was awarded attorney fees. The prisoner, Norris Washington, was hit with a \$500 sanction for filing a "frivolous lawsuit."

Mr. Washington appealed to the Supreme Court of PA, and now Ms. Dugan has won even bigger - so much so that she says her "conscience is troubled." Last month the court ruled unanimously that a criminal defendant could not sue his lawyer for malpractice unless his conviction was first set aside on appeal.

There is more. To sue the lawyer for malpractice a prisoner must show that he was **innocent** of the crime for which convicted. Otherwise, the court reasoned his lawyer's negligence did him no harm.

The decision, a stunning victory for Pennsylvania's criminal defense lawyers and a staggering setback for its prisoner litigants, was reached without appellate briefs or oral argument. Instead, the judges read the briefs filed with the common pleas court in Washington's case and in another prisoner's suit which had also been dismissed by the common pleas court.

Pennsylvania is not alone in trying to curtail prisoners' lawsuits. Alaska's supreme court and lower courts in several other states have ruled that prisoners must prevail in appealing their convictions before they can sue their lawyers. But Pennsylvania appears to be the first state to require, in addition, that prisoners must prove their innocence before they can win suits against their lawyers. See: *Washington v. Dugan*, No. 1932 E.D. Misc, Docket 1993; Decided August 1994. ■

Visitor Search Held Illegal

Lenora Daugherty frequently visited her husband at the Turney Center, a Tennessee state prison. Prior to one of Daugherty's visits a prison guard told the warden that he had received information that she was smuggling drugs into the prison. The warden also received two letters stating the same. Based on this information the warden ordered a strip search of Daugherty and a search of her car for drugs before she would be allowed to visit with her husband. Daugherty's car was duly searched and she was strip searched and subjected to a visual body cavity search, none of which revealed any contraband. Daugherty filed suit claiming that the search violated her fourth amendment rights to remain free from unreasonable searches and seizures. The district court held that the prison officials were entitled to qualified immunity for their actions and dismissed the suit. That ruling was reversed on appeal at *Daugherty v. Campbell*, 935 F.2d 780 (6th Cir. 1991).

On remand the case proceeded to jury trial and the district court held that, as a matter of law, prison officials were entitled to qualified immunity on the fourteenth amendment claim and the jury returned a verdict in prison officials' favor on the fourth amendment claim. Daugherty filed a motion for judgment as a matter of law or for a new trial, the district court denied both motions. The court of appeals for the sixth circuit reversed and remanded.

The appeals court gave a detailed discussion of the appropriate legal standard governing searches of prison visitors. Noting that "A strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience." Before a strip search of a prison visitor can take place prison officials must have reasonable suspicion that the visitor in fact has contraband.

The warden argued that because the guard who told him about Daugherty's alleged smuggling was a reliable guard, unlike the anonymous informant letters, he required no corroboration. The court disagreed. The guard "did not act as an informant but merely as a declarant. An officer's recitation of a tip does not automatically vest the information with credibility or reliability, nor does it transform the officer into a reliable informant. Campbell could not rely on an uncorroborated anonymous tip merely because it was relayed by an officer." "Generalized suspicion of smuggling activity does not justify a strip search... Instead, reasonable suspicion requires individualized suspicion, specifically directed toward the person targeted for the strip search... Reasonable suspicion exists only if the information contained in the tip is linked to other objective facts known by correctional authorities."

In discussing anonymous tips used to justify strip searches of visitors, the court cited extensive authorities from several circuits as to what tips must contain in order to be deemed reliable. Namely, "information in an anonymous tip must 'possess indicia of reliability sufficient to give prison officials reasonable grounds to suspect drug smuggling activity.' Before a tip may justify a search, 'the nature of the tip, the reliability of the informant, the degree of corroboration, other factors contributing to the suspicion or the lack thereof, and the nature and extent of the search must be assessed.'"

Applying the relevant case law to the facts in this case the court held that there was simply no basis for prison officials to conduct the search. The information was general in nature with no objective facts to corroborate the allegation. Moreover, despite visiting her husband for over a two year period, at no time had Daugherty ever been suspected of smuggling drugs into the prison nor was her husband ever accused or suspected of drug activity within the prison. Likewise, the anonymous letters had no indicia of reliability. That the source of the information was a prison guard did not impart the information with any degree of reliability or corroboration given its lack of specifics (the court noted that at trial the guard denied ever telling the warden anything about Daugherty). Because the search contravened well established case law against unreasonable searches the appeals court reversed the jury verdict and held "Campbell's reliance on an uncorroborated tip did not provide reasonable suspicion necessary to authorize a strip search. We, therefore, grant plaintiff's motion for judgment as a matter of law and remand for a determination on the issue of damages." See: *Daugherty v. Campbell*, 33 F.3d 554 (6th Cir. 1994). [In the March, 1994, issue of *PLN*, we had a detailed article on the rights of prison visitors, copies are still available for \$1.00.] ■

No Immunity for Visitor Strip Search

Tina Spear regularly visited her boyfriend, Daniel Wade, at the Northpoint Training center, a Kentucky state prison. Upon arriving for a visit on Christmas day in 1990, prison officials told her she would not be allowed to visit Wade unless she submitted to a strip and body cavity search and a search of her clothing, purse and car. She was told that if she did not submit to the searches she would be detained until an arrest warrant was obtained and she would be barred from visiting Wade in the future. Wishing to see Wade on the holiday she consented to the search. A prison nurse conducted the strip search and the body cavity search, which included inserting her fingers into Spear's vagina and anus. No contraband was found during any of the searches and Spear was allowed to visit Wade.

Spear filed suit under 42 U.S.C. § 1983 claiming that the search violated her rights to remain free from unreasonable searches and seizures guaranteed by the fourth amendment. She stated that the searches left her feeling embarrassed, humiliated and demeaned. Prison officials responded stating that they had ordered the searches because a confidential informant in the prison had told them that Wade was receiving drugs every time a young, unrelated woman visited him and prison records showed that Spears was the only visitor Wade received who met that description. Prison officials filed a motion to dismiss on the ground they were entitled to qualified immunity. The district court converted the motion into one for summary judgment and granted it, holding that the informant tip and Wade's history of drug use in prison provided prison officials with "reasonable suspicion" to strip search Spear. The court of appeals for the sixth circuit reversed and remanded.

The appeals court held that the facts in this case showed that both the strip search and the car search were unconstitutional and their unconstitutionality was clearly established at the time, thus the defendants were not entitled to qualified immunity from money damages or suit. The court noted that the issue before them was not merely whether the defendants actually violated Spear's fourth amendment rights, but whether those rights were clearly established when the officials performed the search.

While the fourth amendment usually requires government officials to have probable cause and to obtain a warrant before performing a search, there are exceptions to this rule. One of those exceptions involves prison visitors who are subject to a "reasonable suspicion" standard. The court gave a brief discussion of the relevant case law applying to the searches of prison visitors. "These cases recognize that citizens do not lose the protection of the Fourth Amendment when they visit prison, but that their protection is reduced because they have a reduced expectation of privacy and because the government has a strong interest in stopping the entry of illegal drugs and other contraband." "The fact that a prison visitor has consented to a search upon prompting from officials does not eliminate the reasonable suspicion requirement... Thus, there can be no dispute that at the time of this search in December, 1990, the law was clearly established that officials needed reasonable suspicion in order to search Spear."

The court also discussed case law which holds that some searches may be legal when they start but may then violate the fourth amendment due to its "intolerable intensity and scope." It noted the different types of searches (i.e. a clothed pat down search; a strip search which is the inspection of the naked individual; a visual body cavity search which involves visual inspection of the anal and genital areas; and a manual body cavity search which involves some degree of touching or probing of body cavities.) "It should be clear to any prison officials that progressively more intrusive searches demand a higher level of suspicion, or particularized suspicion to warrant the search of a particular area or body cavity."

Going to the facts of the case the court held that as a matter of law, "we find that there was simply not enough information indicating that Spear was carrying drugs to subject her to such an invasive search." "Moreover, because the facts were so meager, it should have been apparent to the officials that they did not have reasonable suspicion to initiate the search." Then, considering the intensity and scope of the search, "It is absolutely clear that the officials did not have enough suspicion to subject Spear to a visual body

cavity search, or to a manual body cavity search, both of which they performed. Given the information available, a reasonable person could not have concluded that there was a reasonable probability that contraband would be found in her body cavities, so qualified immunity does not apply. Even Northpoint's own regulations required particularized reasonable suspicion for searches of the anal cavity."

To determine whether prison officials had reasonable suspicion to perform a strip search of a visitor, the totality of circumstances must be taken into account. The court did so and held that it made it even more apparent that Spear's strip search was unreasonable. The facts the court relied on were: prisoners were strip searched after visits. "This fact alone vastly reduces the necessity to invade the privacy of a visitor, and it correspondingly narrows the circumstances in which it is reasonable to subject a visitor to a strip search," during visits prisoners had to sit facing a guard; prisoners and visitors are only allowed to hold hands during visits and are only allowed a brief kiss and embrace at the beginning and end of each visit. "...these circumstances, looked at in the light most favorable to Spear, make the transfer of illegal contraband so difficult that any type of strip search of a visitor is unreasonable without a reasonable probability that she is able to evade the protections."

The court held it was absolutely clear that prison officials lacked any reasonable suspicion to search Spear's car. "Even if there was some reason to believe contraband had been hidden in her car, it was obviously not being transported to Wade and therefore was not properly targeted by the prison visitor exception to the warrant requirement. Such an automobile search is part of an ordinary criminal investigation and requires either a warrant based upon probable cause or the application of an exception to the warrant requirement." The court reversed and remanded the case back to the district court for further proceedings. See: *Spear v. Sowders*, 33 F.3d 576 (6th Cir. 1994). [In the March, 1994, issue of *PLN*, we had a detailed article on the rights of prison visitors, copies are still available for \$1.00.]■

AZ Passes Repressive Prison Laws

As part of the national trend towards bashing prisoners the 41st session of the Arizona legislature recently passed a number of repressive laws designed to make life harder for prisoners as well as restrict their access to the courts. The laws went into effect on July 1, 1994.

§ 31-201.01 of the Arizona Revised Statutes (ARS) was modified to authorize the Arizona Department of Corrections (ADC) to charge prisoners \$5.00 for each visit for medical treatment as well as for prescriptions, medication and prosthetic devices. A similar practice by the Nevada DOC is currently being challenged by ACLU attorneys [See: *PLN*, July, 1994]. (Nevada and Arizona are both in the ninth circuit.) Exempt from the payment plan are pregnant prisoners, those in mental health units, reception centers, Unit 8 at Florence, juvenile prisoners, prisoners with chronic health problems and the developmentally disabled.

§ 12-302 and § 12-306 of the ARS were modified to no longer allow state courts to waive court fees for indigent prisoner litigants. Nothing in the statute prohibits the filing of legal actions if the applicant can't pay the legal fees. But, when the prisoner has funds available the court will have the ADC collect the amount due. "...on filing the court shall assess and, when funds exist, collect as partial payment of any court fees required by law a first time payment of twenty percent. Thereafter twenty percent of all deposits into the prisoner's spendable account administered by the state department of corrections shall be withheld until the actual court fees are collected in full." The ADC will forward the collected monies to the relevant courts on an annual basis. This applies to all civil actions and proceedings except for dissolution of marriage and child support cases.

§ 31-201.01 was modified to grant state employees and agencies immunity from having to follow state laws or statutes. "No person convicted of a felony who is incarcerated while awaiting sentence or while serving a sentence imposed by a court of law has a cause of action seeking damages or equitable relief from the state or its political subdivisions, agencies, officers or employees for injuries suffered while in the custody of the state or its political subdivisions or agencies unless the complaint alleges specific facts from

which the court may conclude that the plaintiff suffered serious physical injury or the claim is authorized by a federal statute." Serious physical injury was defined as "impairment of physical condition that creates a substantial risk of death or that causes serious disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ." This law may be argued to show a federal court that Arizona prisoners have no adequate "state remedies" for violations of due process, property deprivations, etc.

The ADC can now deduct money from prisoners' spendable accounts to pay for state property damaged or destroyed by the prisoner; medical treatment for injuries the prisoner inflicts on himself or others; searching for and catching prisoners who escape or seek to escape; and quelling riots or disturbances in which prisoners are involved.

§ 31-230 was created which orders the ADC to establish an annual cost of incarceration for prisoners which is supposed to be the average amount spent to keep each prisoner captive. "The state shall have the right to set off the cost of incarceration calculated under subsection A at any time and without prior notice against any claim made by or monetary obligation owed to a person for whom a cost of incarceration can be calculated, except that twenty percent of any claim or monetary obligation shall be exempt from the provisions of this section."

"If a person for whom a cost of incarceration can be calculated obtains a monetary judgment against the state and the attorney general appears and exercises the right of this section, any monies set off against the monetary judgment shall be distributed as follows." The state's general fund gets 70% and the AG's office gets the remaining 30%. This statute is plainly unconstitutional if the state tries to apply it to prisoners' successful federal § 1983 actions against state officials. A remarkably similar statute has already been held unconstitutional in *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), the appeals court held that the Missouri Incarceration Reimbursement Act was unconstitutional when prison officials sought to confiscate the money damages awarded to prisoners who successfully sued their captors for

constitutional violations. It held that the statute was contrary to the goals of § 1983 which seek to ensure that federal constitutional injuries by state officials are compensated and redressed.

§ 41-1604.07 was modified to allow the ADC to forfeit five days of a prisoner's earned release credits if "the court or a disciplinary hearing held after a review by and recommendations from the attorney general's office determines that the prisoner does any of the following: 1. Brings a claim without substantial justification. 2. Unreasonably expands or delays a proceeding. 3. Testifies falsely or otherwise presents false information or material to the court. 4. Submits a claim that is intended solely to harass the party filed against."

We ask that our readers in different states keep us advised of changes in the law, and challenges to it, that affect prisoners so we can report it. We rely on you to send us local information that will be of interest to prisoners and their supporters across the country. ■

Brutality Protested

On October 10, 1994, more than 25 protesters marched on the Oak Park Heights state prison in Minnesota. The demonstrators entered the prison lobby and demanded to meet with warden Erik Skon, who declined. The march was organized by the Love & Rage Anarchist Federation of Minneapolis to protest the repression of Shannon Bowles. Bowles was placed in segregation after he reported the beating of prisoner Pablo Salazar by prison guards. Salazar was also in segregation as a result of the beating.

After thirty minutes of telling the protesters to leave, the Washington county sheriff was summoned at which point the demonstrators left. None were arrested. The demonstrators carried placards calling for the release of Bowles, an end to brutality by guards and a shutdown of the prison control unit. ■

Source: *Workers World*, November 3, 1994.

Fear and Loathing in California

by Willie Wisely

As the campaign of hatred against people in prison reaches a frenzied crescendo in this era of reactionary politics, several draconian measure were passed by California legislators in the 1994 session vying with each other for the title, "Toughest On Crime."

A version of the so-called "Three Strikes" law swiftly passed both houses of the state legislature and was signed into law by Governor Pete Wilson. The law doubles statutory sentences for a second serious felony offense, and mandates a term of 25 years to life for the third. It applies to even nonviolent felonies, and has already resulted in life sentences for several people convicted of petty theft. This poorly drafted legislation was analyzed by the Judicial Council of California and found to have a number of critical flaws. The analysis represents the views of thirteen judges from around the state. One of the potential problems singled out by the panel were provisions in the new law involving felonies committed by teenagers. Another major defect is the elimination or reduction of good time work time credits for prisoners convicted of selected crimes. The judges found that this may violate the equal protection clause of the U.S. Constitution.

California voters also passed a "Three Strikes" initiative, placed on last November's ballot by self-appointed crime fighter, Mike Reynolds. Reynolds joined the "tough on crime" army after his daughter was murdered in 1982. According to Reynolds, three judges helped write the controversial initiatives. If true, the Code of Judicial Ethics would require those three judges to recuse themselves from hearing any cases involving challenges to the initiative, however Reynolds refuses to say who the judges are, and they have not identified themselves. The initiative version requires judges to count even juvenile offenses as "strikes." The Office of Legislative Analyst has reported it will cost taxpayers an additional \$1 billion each year, just for the "Three Strikes" prisoners over and above nor-

mal prison operating costs. "Three Strikes" cases involving relatively minor offenses have virtually swamped Los Angeles and other counties since the initiative was passed. One of the added costs of this legislation is the fact that defendants facing a third-strike conviction are much less likely to plead guilty. The resulting increase in criminal trials threatens to overwhelm the courts.

The "One Strike" law, which mandates life sentences for specified sex offenses involving violence or underage victims also passed the legislature. It was signed into law by Governor Wilson, who was re-elected in November. Wilson's campaign was based solely on Proposition 187, the so-called "Save Our State" initiative which prohibits illegal aliens from attending public schools, receiving financial assistance, or medical care. Prop 187 passed and it now requires school teachers, nurses, doctors, social workers, and even abortion clinic counselors to demand proof of citizenship from "suspicious" persons.



The prison family visiting program remains intact for now. Proposed bills AB X25 and X35, sponsored by ultra right-wing Assembly member, Dean Andal, were defeated in committee hearings, but given reconsideration once the public left the hearings. Andal eventually succeeded in getting a portion of one of the bills attached to the Budget Act as a rider. This amendment gives the CDC the authority to terminate family visits for certain classes of sex offenders. Andal's staff later admitted that it chose to target sex offenders with the amendment because of a belief that they would be afraid to protest.

The politically powerful prison guard's union voted overwhelmingly in favor of taking family visits at a secret statewide rally. Right wing social activists, disguised as victims' rights groups,

are planning an all out assault against prison family visits beginning with the 1995 legislative session.

Senate Bill X22, which initially would have banned weight lifting in California prisons and youth facilities, was amended at the last minute when a similar provision was stricken from the federal Omnibus Crime Bill. The version that was signed into law defines prisoner access to weights as a "privilege" and requires the Director of the Department of Corrections to submit a "plan" by June 1995 for the use of weights in prison that does not include building strength or muscular size.

Assembly Bill 113 also made law. This bill requires California prisoners to pay five dollars for all "non-emergency" sick call visits. California Correctional Institutions, and other prisons, have already implemented new medical care policies. These include taking all aspirin and Tylenol from the housing units, and requiring prisoners to purchase over-the-counter medications like Advil and Actifed at inflated prices at the canteen.

This is a dangerous bill which will not save money. The time and effort required to process the five dollar trust withdrawals will cost ten times any amount recovered. Prisoners who make an average of \$15 a month, and have to buy toiletries at retail prices, may choose not to seek medical attention for persistent coughs, headaches, or rashes. These symptoms may signal the onset of highly contagious, potentially life-threatening, diseases like tuberculosis, hepatitis, or HIV. Some 30% of California prisoners are now infected with tuberculosis.

Rather than focus on the roots of crime, politicians, the media, and the public in California have scapegoated two powerless groups (prisoners and illegal aliens) who lack monied lobbyists and organized support. People in prison and illegal aliens are not the cause of California's problems. But because lawmakers have shirked their obligation to serve the public's best interest in favor of appealing to the mob mentality, the problems will continue to worsen and the state's debt will continue to grow. ■

News In Brief:

TX: On November 23, 1994, Hidalgo County sheriff Brig Marmolejo was sentenced to seven years in federal prison after being convicted of taking more than \$ 151,000 in bribes from convicted drug dealer Homero Beltran Aguirre, who was awaiting trial in the jail between 1991 -93, in exchange for giving him special privileges in the jail. Beltran testified that he paid Marmolejo \$5,000 a month to have conjugal visits with his wife and girlfriend in the sheriff's office, he would pay an additional \$1,000 per visit. He also gave the sheriff dried goat meat, \$1,000 watches, a \$10,000 sports car for his daughter and a no interest loan to pay for a pavilion at the daughter's wedding on the sheriff's ranch. Marmolejo had been sheriff for 18 years.

WA: Convicted double murder Mitchell Rupe recently had his death sentence reversed by Seattle federal judge Thomas Zilly. In addition to overturning his death sentence the court also found that Rupe, who weighs 409 pounds, was too heavy to hang because of a likelihood that he would be decapitated. The state argued that even if he were decapitated it would be quick and painless. Washington murders its citizens by hanging them unless they chose lethal injection. Rupe refuses to choose. The DOC responded that the solution is to change Washington's means of murder to lethal injection to avoid this type of problem. After the ruling King County (Seattle) prosecutor Norm Maleng wrote DOC officials requesting that they ban commissary privileges for death row prisoners so they cannot evade the death penalty by "gorging." Maleng needs to eat a few Snickers and get a life.

USA: The ninth circuit court of appeals dismissed the forfeiture of money in a drug case stating that just because money has drug traces on it proves nothing. Past studies have shown that most cash money in circulation in the US has cocaine traces on it. One study by the DEA showed that a third to half of all paper money had drug traces on it. Another study by Dade County, FL, toxicologist William Hearn showed that out of 135 bills collected around the country, 131 had drug traces on them.

MI: Prisoners at the federal prison in Milan caused a major disturbance in Oc-

tober, 1994, when a fight involving more than 100 prisoners broke out. No one was seriously injured though the fighting lasted over 20 minutes before being quelled by staff, according to prison spokesman Mike Keel.

WA: Seattle policeman Alan Hampton was charged with two counts of third degree child rape on November 29, 1994. According to the charges filed in state court, Hampton began having sex with a now 14 year old girl in 1993, when she was 12, after which he fondled her in patrol cars, flew her from Colorado to have sex with him and boasted of the encounters to other police. Hampton, who is married, would bring the girl to his home for sex while he was on duty and his wife was at work. Seattle police internal affairs had conducted an investigation of Hampton after other police and Child Protective Services filed complaints. Criminal charges weren't filed until the victim told a counselor of the sexual activity and provided a videotaped statement, letters and nude photos that Hampton had sent her.

TX: On October 13, 1994, a Dallas County jury convicted Hunt county judge Michael Farris of felony drug possession. Videotape evidence showed Farris buying methamphetamines from an undercover drug agent. Ferris claimed he was entrapped. He was introduced to the "drug dealers" by Hunt County justice of the peace Dan Robertson.

WA: Former federal prosecutor Howard Nichols pleaded guilty to federal drug conspiracy charges in Spokane, WA on November 21, 1994. Nichols confessed to conspiring with others to buy and sell 110 pounds of cocaine in Washington and Idaho. Drugs and money changed hands in Nichols' Spokane law office. Under the terms of his plea agreement Nichols agreed to snitch on his co-conspirators. By pleading guilty Nichols will receive a 41 month prison sentence with 5 years of supervised release. Had he been convicted at trial as charged he would have received a mandatory minimum sentence of 10 years.

CT: To cope with a massively expanding prison population the state is opening its own control unit prison, Northern Correctional Institution, at Somers. Designed to hold 300 prisoners it is already being touted by DOC officials as being only for "the worst of the worst." Admitting it will be a sensory deprivation unit, warden David May

says it is not totally dehumanizing because "Even if it's putting cuffs on and taking them off, that's contact." Using that logic, so are beatings. It cost \$44 million to build the new control unit prison.

Venezuela: On November 29, 1994, 100 prisoners at the Tocuyito prison in Carabobo escaped through the prison's sewage tunnels during a power failure. Human rights groups have claimed that Venezuela's prisons are the most dangerous in the continent. A local television station said that there were only 15 guards for the 1,800 prisoners at Tocuyito.

CO: The electronic home arrest and monitoring systems now in use are based on identification technology developed by BI Inc. in the 1970s to keep track of dairy cows. BI's electronic arrest concept grew from the technology they first developed to identify dairy cows and keep track of their individual milking schedules.

MA: On November 3, 1994, Medway policeman James Boyan pleaded not guilty to charges that he raped and beat an unnamed snitch over a four year period. The snitch claimed that he beat and raped her while he was on duty and off, including in police vehicles. Boyan admits to having sex with the women but claimed it was consensual.

NY: On October 27, 1994, former New York State Police investigator Edward Pilus was sentenced to 2 to 8 years in prison for faking evidence in a 1991 Rockland County car jacking.

LA: On November 4, 1994, Gerald Mercadel escaped from a maximum security cell in the Orleans Parish Prison. It was his second escape from the jail in less than a month.

IL: On October 27, 1994, Donald Savage, a part time clerk at the US Customs warehouse in Chicago, was sentenced to 18 months in prison for stealing 20 guns from an evidence locker and selling them to private parties.

IA: Non violent prisoners from the Sedgwick County Jail are being housed in the local Courtesy Inn. The motel's management claims that the motel is more secure than a halfway house.

MN: Prisoners at the Stillwater and Lino Lakes state prisons will no longer be allowed to do telemarketing for Fortune 500 companies. According to prison officials, some prisoners were "making too much money" with one

prisoner allegedly making \$23,000 in a few months in 1991. Given our experience with prison slave labor programs this sounds pretty far fetched. Any comments from Minnesota readers?

AZ: The Huachuca Police department made \$45,000 from the undercover sale of marijuana and "lost" 15 pounds of the samples.

TX: On October 26, 1994, US Customs agent Richard Cardwell and Dept. of Public Safety Sgt. Robert Nestoroff surrendered to face charges that they had helped drug smuggler Rodney Matthews smuggle 1,500 pounds of cocaine into the United States.

AK: The Alaska DOC announced that they were shipping 250 prisoners to the Pinal Detention Center in Florence, AZ. by November 15, 1994, in order to ease prison overcrowding and avoid a \$5,500 a day court ordered fine for violating the crowding limits imposed on the state prison system. The first prisoners to be shipped to Arizona will be untreated sex offenders.

CA: The FBI is investigating the shooting deaths of seven prisoners by prison guards at the California state prison at Corcoran. This is the highest number of shooting deaths in the California state prison system, and that system has more prisoners shot and killed by guards than the other 10 largest prison systems in the US combined. ■

Revolutionary Literature at Half-Price

Pathfinder Press prints and sells revolutionary literature on a variety of subjects, including the works of Lenin, Marx, Trotsky, Malcolm X, the American labor movement, Latin America, Africa, and more. As a special program for prisoners, Pathfinder offers all the materials in their catalog at half price plus a flat \$2.50 shipping cost. This is quite a savings.

A free catalog and more information is available by writing: Pathfinder Press, Prison Program, 410 West St. New York, NY. 10014. ■

Rikers Island Detainees in Struggle

Rikers Island is the largest penal colony in the world, holding more than 19,000 prisoners on a 410 acre island. Most of them are New York City pretrial detainees not convicted of any crime. The number of detainees is expected to increase to as high as 25,000 in coming months as Republican mayor Rudolph Giuliani makes good on his campaign promises to "improve the quality of life" in New York City by locking up the homeless, street vendors, panhandlers, etc.

To make good on campaign promises to balance the city budget Giuliani has proposed over \$31 million in budget cuts. These two factors have come together to make Rikers Island the focus of the most intense struggle in several years. Among the jail programs to be eliminated as part of the budget cuts are the jail's 900 bed drug treatment program, its 23 person grievance investigation unit, its food industry job training program and will lay off 897 jail guards and 400 civilian workers. The new staffing cuts come on top of previous staffing cuts, and increases in the detainee population, that has required most of the jail's 9,800 guards to work 16 hour double shifts three days a week. The city is now paying more than \$110 million to the guards in overtime alone.

Since November 15, 1994, captives at the jail have staged strikes to protest proposals by NYC Mayor Rudolph Giuliani to cut vocational, drug treatment and counseling programs at the jail. About 2,000 prisoners refused to eat on November 19, according to a jail spokesperson. The prisoners' demands, reported in *El Diario*, include better food and medical care, reinstatement of the GED classes, reinstatement of social workers to pre budget cut levels and the transfer of abusive guards who harass prisoners. Family members and supporters have been protesting outside the jail complex as well.

Because jail food workers were on strike, jail guards had to serve prisoners their food, the ones who would eat anyway. Three guards were suspended after they refused to serve food, one refused, one overturned a cart of food and a third complained of a back injury. A spokesman for the Correction Officers Benevolent Association was quoted say-

ing the guards were "livid" at being ordered to perform "prisoners' work" which they claimed "undermined their authority." This authority was apparent when Commissioner of Correction Anthony Schembri announced that a guard had been arrested smuggling contraband into the jail, in the form of razor blades and a knife blade, presumably for sale to prisoners. [Editor's Note: Past issues of *PLN* have reported on the sale of firearms to NYC prisoners by jail guards.]

Robert Gangi, head of the Correctional Association of New York, a private prison watchdog group, was quoted by the *New York Times* stating: "Absent a disturbance, the mayor will get all or most of what he wants." He noted that prison reform usually follows a riot. "What's striking in this is that I can't recall when we've had an organized political protest by inmates about budget cuts coming down the pike. That is an unusual level of sophistication."

Gangi's quote displays an unusual level of ignorance about the detainees' situation. Their protests are not based on abstract issues like proposed budget cuts but on very real overcrowding, brutality, dehumanization and a concomitant decline in services and basic living conditions. Detainees have reported to other local newspapers that they are fed irregularly and when fed at all, receive only white rice, white bread and water. Prisoners are being placed in unheated trailers, sent to yard at 4 and 5 AM and then having to lay in bed all day because there are no other recreation facilities. One detainee was quoted in the *Revolutionary Worker*: "The officers in there are too violent with the inmates. They stabbed one inmate, and no one knows who it was. This was a week ago [Nov. 20, 1994]. And yesterday, four officers beat up an inmate so badly that he's in critical condition.... The officers are so violent with them, you know, treating them like if they were animals." The prisoners have repeatedly tried to get their message out to the corporate media, such as the *New York Times* and television stations, to no avail: [Editor's Note: In three large *New York Times* articles that we used as background for this piece not once was a prisoner or prisoners' family member quoted or contacted.] The prisoners' struggle continues. ■

Texas DOC To Ban Tobacco Use

On November 18, 1994, Texas prison officials voted to ban all tobacco use throughout the state's criminal justice system. The ban, unanimously approved by the state Board of Criminal Justice, covers all tobacco products and all property owned or leased by the Texas Department of Criminal Justice (TDCJ) and applies to prisoners and employees alike. The TDCJ is the second largest prison system in the country with over 100,000 prisoners and 33,000 employees. The ban is scheduled to go into effect on March 1, 1995.

Asked about the smoking ban, Board member Allan Polunsky said: "We're not operating the Ritz Carlton" and prisoners "will have to abide by the rules, and that's it."

PLN has reported on smoking issues in the past. In its 1993 ruling in *Helling v. McKinney*, the supreme court held that

prison officials were liable for exposing non smoking prisoners to Environmental Tobacco Smoke (ETS) or second hand smoke [PLN, Vol. 4, No. 9]. Prior to that ruling there had been a split in the circuits as to whether exposure to ETS violated the eighth amendment ban on cruel and unusual punishment.

Many jails across the country have banned smoking. Several bans have been unsuccessfully challenged in court. The challenges have invariably been dismissed because prisoners and detainees have no state or federal constitutional right to smoke. The only prison system to ban smoking prior to this has been the Vermont DOC. That ban only lasted some six months because of the smuggling problem caused by the ban, with cigarettes being sold for \$5 each and packs going for up to \$80. [PLN, Vol. 3, No. 7]. Vermont prison officials dropped the smoking ban as unrealistic. ■

OR Voters Pass New Prison Laws

On November 8, 1994, Oregon voters passed three criminal justice measures that will cost millions to implement. Measure 10 requires a two thirds vote by the legislature before it can change voter approved prison sentences.

Measure 11 imposes mandatory minimum prison sentences on defendants convicted of violent offenses and bars early release. The laws apply to adults and juveniles over the age of 15. The measure is currently projected to require 6,085 new prison beds by 2001 and 3,010 more by 2005. Analysts state that construction costs for the first five year period will be \$461 million. Operations costs will steadily increase, from an additional \$3.2 million in 1995-96, to \$100 million a year by 2001. Oregon currently holds about 6,600 prisoners.

Measure 17 requires prisoners to work 40 hours a week and allows prison workshops to compete with private businesses. These programs will cost an estimated \$40.2 million to implement in 1995-97 and \$10.9 million for equipment, inventory and construction of work facilities. Kevin Manix, the Democratic state legislator who sponsored the measures stated "This is just the beginning in pushing back crime in Oregon." ■

CT Phone Suit Filed

The Connecticut Civil Liberties Union (CCLU) has filed suit against the Connecticut DOC over a phone monitoring system recently implemented by the DOC. *Washington v. Meachum*, Case No. CV-94-0534616S was certified as a state wide class action suit on May 3, 1994, in the state Superior Court in Hartford.

The lawsuit claims that Connecticut state regulations §18-81-28 through 18-81-51, violate the Connecticut wiretapping statute, the Connecticut eavesdropping statute, the AIDS testing and Medical Information statute and the United States and Connecticut constitutions. The suit claims that the CT DOC lacks the authority to adopt the phone and mail regulations in question. The regulations in question limit non-monitored attorney calls to less than 10 minutes, such calls are also difficult for prisoners to place in the first place.

The regulations also allow the random opening of prisoners' outgoing mail. The suit claims this practice violates the federal and CT constitutions. [Editor's Note: In *Procunier v. Martinez* the US Supreme court upheld prison rules allowing the opening and censorship of prisoners' outgoing mail.] The lawsuit seek damages, declaratory and injunctive relief. A trial was held in July, 1994. We will report the verdict. ■

Unconstitutional Jail Conditions Don't Need to Be Relitigated

Chris Hall was a pretrial detainee in the Little Rock, Arkansas, city jail. He filed suit under 42 U.S.C. § 1983 claiming that jail conditions had violated his constitutional rights. Arrested for shoplifting, Hall spent 40 days in the jail, confined to a windowless cell for 24 hours a day. During much of that time Hall shared a two man cell with three other men, which gave 14.22 square feet of cell space per person. Hall was required to sleep on the floor despite painful injuries and was denied all opportunity for exercise. The district court dismissed the suit finding that Hall had not introduced enough evidence to show how he had individually been affected by the jail conditions. The court of appeals for the eighth circuit reversed and remanded finding that because the jail conditions had already been litigated in another case, and found unconstitutional, the lower court erred by not applying the relevant findings from that case.

At trial, the parties stipulated to the testimony and evidence in *Daniels v. Dalton*, a case which found the jail conditions to be unconstitutional and the defendants did not appeal. After a bench trial in this case, by another judge, the court dismissed the suit stating that Hall had introduced no evidence that the overcrowding had affected him personally.

The appeals court discussed the minimum square feet per prisoner in jails. In *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir.1980), the court held that prisoners locked in their cells more than 16 hours a day and held for less than a week, they should be given a minimum of 32 square feet of space each, those held for more than a week would be given 43.3 square feet each.

Because the jail conditions at issue had already been found unconstitutional in *Daniels*, "we hold that the District Court erred in requiring a further, individualized showing to prove that Mr. Hall's due process rights were violated." The defendants claimed that Hall had not proven he suffered any actual damages. "We remand for the purpose of determining, on the basis of the entire record, whether this is so. Even if it is, Hall is entitled to a finding of liability and nominal damages for the violation of his constitutional rights." See: *Hall v. Dalton*, 34 F.3d 648 (8th Cir. 1994). ■

Former TX Parole Board Chairman Sentenced

Former Texas state parole board chairman, James Granberry, pleaded guilty in April of 1994 to charges that he committed perjury during an investigation of independent "parole consultants."

After Granberry resigned from the Board of Pardons and Parole in May 1991, he set himself up as a freelance parole consultant. Granberry, and other former Texas parole board members, made a practice of marketing their influence as former Parole board members, collecting "consulting fees" from prisoners desperate for freedom. This practice has since been outlawed by the state but only after public furor focused attention on the issue when paroled murderer, Kenneth McDuff, abducted and killed a pregnant convenience store clerk. When McDuff was arrested he had a business card in his wallet from the parole consultant (another former parole board member) who assisted in his successful parole bid. After the McDuff case an investigation was launched into the practice of former parole board members collecting fees to act as parole consultants.

Granberry was charged with perjury, accused of lying to a federal magistrate about the extent of the consulting business he ran. Federal prosecutors said

Granberry served as a consultant for prisoners and their families on 22 cases and was still receiving fees when he testified in 1992 that he had handled only six or eight cases and was no longer in that business.

In entering the guilty plea before U. S. District Judge Walter Smith, Granberry also admitted that while he was still a member of the parole board he helped a Dallas car dealer's son win a parole in exchange for a reduced lease payment on two automobiles.

In August of 1994 Granberry was sentenced to serve six months in a halfway house. Justice for All spokesperson Pam Lynchner of Houston said the sentence was "absolutely appalling. The court not only let him walk without any prison time, they are going to allow him not to pay any monetary fine."

Granberry had cooperated with federal prosecutors in exchange for a lenient sentence. He testified before a grand jury that while he was a "consultant" he was routinely given confidential information from prisoner files by then active parole board member, Frank Eickenburg. Eickenburg was indicted by the grand jury for his complicity in those cases. ■

Speeding Cop Loses Job

A New York police officer, Steven Schwartz, liked life in the fast lane. His personalized license plate read "MY T QUICK". Schwartz was also "MY T DEADLY". While responding to a police call in 1987, Schwartz struck and killed a pedestrian in a crosswalk when he ran a red light at more than 45 mph. Thirteen months later he was fined \$500 for reckless driving after weaving through traffic at more than 100 mph in his own car. Nine days later he struck and killed another pedestrian while driving to work. Witnesses said that he was speeding and that afterward he showed his badge to bystanders and said, "You didn't see anything."

He was never charged in the deaths and no departmental charges were brought against him. The department, however, did send undercover officers to watch him. One day they saw him run three red lights in his own car. On another day he was observed running two red lights. In April 1989, formal departmental charges were brought against him, and he was docked 10 vacation days. In September 1990, he was stopped on the Staten Island Expressway for going over 100 mph. Two days later he was stopped on the same road for going 124 mph. New departmental charges were brought against him, and this time he was fired. *Source: Associated Press [Editor's Note: This story has little to do with prison news. It was just too ironic to pass up.]* ■

No Interlocutory Appeal From Judgment

In the July, 1994, issue of *PLN* we reported *Littlewind v. Rayl*, 839 F.Supp. 1369 (ND 1994). The case involved a North Dakota state prisoner who, after assaulting a guard, was put into four point restraints, naked, for seven hours, 23 hours in three point restraints and then spent seven days in leg irons and handcuffs. During this time he was denied clothing and a toothbrush for six days, a blanket for two. A jury found in favor of prison officials but the district court vacated the ruling and entered judgment as a matter of law in favor of Littlewind. The ruling held the defendant prison officials liable for violating Littlewind's eighth amendment rights and ordered a new trial on the sole issue of damages. The defendants appealed and the court of appeals for the eighth circuit remanded the case holding it lacked appellate jurisdiction.

Appeals courts can only hear appeals from "final judgments." An exception to this rule is when a public official appeals the denial of qualified immunity at the pretrial stage. The defendants sought to style their appeal as one appealing the denial of qualified immunity. The court held that the defendants' failure to file an interlocutory appeal on the qualified immunity issue when the lower court first denied it in 1992, coupled with their failure to include the issue in either their notice of appeal or statement of issues on appeal "demonstrates the incidental nature of this issue. Instead, the defendants' effort to assert a qualified immunity defense now appears to be a last ditch attempt to revive the appeal in order to have this court consider the substance of their claims."

The court held that on the facts in this case, the defendants had waived their opportunity to assert an appeal on the qualified immunity claim and that the lower court's order was not a final, appealable order. Thus, the court lacked jurisdiction to hear the appeal. The case was remanded back to the lower court for further proceedings. See: *Littlewind v. Rayl*, 33 F.3d 985 (8th Cir. 1994). ■

S. Ct. Revokes Review

In the November, 1994, issue of *PLN* we reported that the Supreme Court had granted review in *Rowe v. DeBruyn*, 94-249. The case involved an Indiana state prisoner who was fractured and punished for defending himself against an attempted rape attack. The question the supreme court initially agreed to decide was whether the prisoner had a right protected under the due process clause to defend himself. On November 17, 1994, the supreme court announced that it had reversed the grant of certiorari and would not hear the case after all. Given the fact that the supreme court docket is at its lowest in more than 40 years it is unclear why certiorari was revoked. The lower court decision is reported at 17 F.3d 1047 (7th Cir.1994), and was reported in the July, 1994, issue of *PLN*. ■

Information Wanted and Announcements:

Are you a Canadian serving time in a U. S. prison for LSD? Please contact Canadian journalist Paul Webster at: CBC, The Fifth Estate, P.O. Box 500, Station A, Toronto, ONT. M5W 1E6, Canada. Telephone collect: (416) 205-6665.

Wanted: Prisoners Extradited from Brazil. If you were extradited from Brazil or have been jailed in Brazil and suffered any injuries or torture I would like to hear from you. I am presently researching the possibility of a class action suit against the government of Brazil. Please forward complete information about your experiences and anything else you think I should know about. Please try to type your letter. Write: Attorney Jeff Orren, 26 East Exchange St. Suite 400, St. Paul, MN. 55101-2264.

College researcher seeking case histories of people who committed murder in order to be executed by the state. In my research I have found 20 cases of people who committed murder so that they could be executed. Few of these made it to death row, they were considered crazy. However, I believe they were making a rational but cruel decision. Please write to me if you know of such cases. Sometimes prison guards or cell mates are killed for this reason, as an attempt at suicide through indirect channels. Contact: Katherine van Wormer, Ph.D., Associate Professor, Social Work Dept. 30 Sabin Hall, University of Northern Iowa, Cedar Falls, IA. 50614.

In the July, 1994, issue of *PLN* we reported that the *Ruiz* litigation in Texas may be reopened and prisoners were encouraged to send information about complaints and conditions in the Texas DOC to attorney Donna Brobry. Her address is: 390 Hayes St. Suite 2, San Francisco, CA. 94102.

Are you a confined Moorish American and active member of the Moorish Science Temple of America? For information regarding a potential class action lawsuit filed in federal court in the Dis-

trict of Columbia, *Williams v. Reno*, No. 2655-EGS, involving the free exercise of religious rights under the Religious Freedom Restoration Act contact: Haywood Williams-Bey # 20232-083, P.O. Box 3000, White Deer, PA. 17887.

Journalism student at Antioch College working on collection of writings by prisoners about the HIV/AIDS crisis is interested in corresponding with all sorts of people: men, women, people with AIDS/HIV, people who don't know much about it, why they think it exists, what

should be done about it, where and how they get information about the epidemic, etc. I am still collecting ideas and opinions. If you are interested in sharing yours please write me at: Tania T, P.O. Box 624, Yellow Springs, OH. 45387.

Prison Information Service in Sioux Falls, SD, states they are completely sold out of copies of their books *Bibliography of Selected Prison Cases* and *Aboriginal Handbook*, which have been blurred in *PLN* in the past. So please do not write for more. ■

Settlements and Jury Awards

NJ: Former Bayside State prison, NJ, doctor John Napoleon, will have to pay six prisoners \$80,000 to settle an eighth amendment medical neglect suit against him. The prisoner plaintiffs, all incarcerated in NJ state or county prisons, claimed that Napoleon deliberately failed to treat them after being notified of their illnesses. They claimed Napoleon refused to examine them and refused them medication they had been taking for years. After one prisoner sued that case was dismissed for lack of a cause of action. While he was appealing the other five prisoners filed suit against Napoleon on similar issues. The third circuit reversed the first case for trial and the state then entered into settlement negotiations. The case is *White v. Napoleon*, No. 88-0497(JBS).

WA: In November 1994, the King County (Seattle) Washington, jail settled a racial bias suit with a jail guard for \$150,000. So far the county has paid more than \$800,000 to 19 jail guards who claim they were the victims of racial discrimination. Four other cases are still pending. The guard, Frank Foster, claimed he was subjected to a hostile work environment including racist literature and comments and was denied advancement and better work assignments because he is black. The case was settled one day into trial before a state court jury [*Editor's Note: If black guards are being treated like this how do black detainees fare?*] ■

Prisoner Raped by Custodians

A federal woman prisoner being transported from the Danbury prison in Connecticut to one in Texas was sexually assaulted by the owner of Fugitive One Transport, Arnold Faulhaber, and a company guard, Joseph Jackson. Both suspects were arrested on October 8, 1994, and charged by Monmouth County, New Jersey, prosecutors with sexually assaulting someone in their custody and over whom they had supervisory power. Both were released on \$50,000 bond.

The victim states that she was picked up in Danbury and driven to Faulhaber's office. Faulhaber asked her to go to Atlantic City with him and party rather than spend the night in the Ocean County Jail. She refused and was taken to the jail by Jackson. En route to the jail, Jackson allegedly drove to a remote area and raped her. Jackson threatened to charge her with attempted escape if she reported the rape to law enforcement officials.

On September 24, 1994, Faulhaber took the victim to his Ocean Township home and raped her. Jackson raped her yet again before she was finally flown to Texas to face charges. Upon being incarcerated in Dallas she told her family about the rapes and they in turn reported the crime to the Monmouth County sex crimes unit. ■

Exposure to Cold Illegal, Rectal Search Upheld

Ronald Del Raine is a long time *PLN* supporter and an even longer term prisoner at the US Penitentiary at Marion, Illinois. In 1984 Del Raine filed suit claiming that assorted guards and officials at Marion had violated his eighth amendment rights by repeatedly exposing him to cold weather by not repairing a broken window in his cell, by subjecting him to a digital rectal probe and that he was deprived of personal property without due process of law when his written materials were destroyed by guards. In the ten year course of this litigation the case has been up and down the courts several times and has yet to get to trial. This published ruling is the latest installment, resulting from the lower court's dismissal of the entire suit. The court of appeals for the seventh circuit affirmed in part, reversed in part and remanded in a lengthy ruling.

Before addressing the merits of the case the court gave an extensive discussion on pro se prisoner litigants' right to have their papers served upon prison employees by the marshals service. In this case the defendants alleged that Del Raine had not properly served them with the complaint within 120 days of filing it, as specified by Fed. R.Civ.P. 4(c)(2)(B)(i), and the lower court dismissed several defendants on the grounds that it lacked jurisdiction over them. In *Sellers v. Peters*, 902 F.2d 598 (7th Cir. 1990), and several cases from other circuits, the court held that prisoners can expect to rely on the Marshal's service to serve their legal papers on defendants, especially those employed by the Bureau of Prisons (BOP). The Marshall's failure to serve legal papers on a defendant is "good cause" to excuse a prisoner's failure to properly serve defendants. In this case the court did not reach that conclusion because Del Raine did not give the marshals the amended complaint to serve on the defendants until the 120 day period had already expired. Thus, the lower court properly dismissed the additional defendants.

In his complaint Del Raine stated that he was periodically handcuffed and strip-searched in a holding cell while his cell was ransacked by guards during the start of Marion's infamous lock

down in 1983 [See: *PLN*, Vol. 5, No. 10]. While in the holding cell with a broken window, it was very cold, with outside temperatures reaching 40 to 50 degrees below zero. He was provided with no clothing, blankets, gloves or jacket. Prison officials ignored his requests to fix the window or heat the cell.

The appeals court gave an extensive discussion and history of prisoners' eighth amendment right to avoid prison officials' deliberate indifference to their serious medical needs. This right includes a right to be provided with adequate food, shelter and clothing, specifically for this case it includes the right to warm accommodations. In the appeal, the court was asked by Del Raine to adopt an objective standard of recklessness to prisoners' well being. The court declined. "We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

The court examines numerous cases involving the exposure of prisoners to cold weather and conditions without appropriate clothing and notes that all have concluded that it violates the eighth amendment to knowingly expose prisoners to cold weather. This right is so well established that prison officials who violate it are not entitled to qualified immunity for their actions. In this case Del Raine alleged sufficient facts in his complaint to satisfy both the objective and subjective components of his eighth amendment claim. This aspect of the suit was remanded to the lower court for further proceedings.

After ten years of litigation the only claim that has gone to trial in this case was the claim that Del Raine was subjected to an improper digital rectal probe. The district court granted the defendants a directed verdict on this issue. The evidence at trial showed Del Raine was handcuffed, taken to a foyer near the prison hospital where his underwear were pulled down, he was bent over and a physicians' assistant performed the

digital rectal search, and did not remove the excessive lubricant. Del Raine was then subjected to two X-rays.

The appeals court discussed numerous cases involving digital rectal searches, many arising out of Washington state and Arizona, noting that "By its very nature, a rectal search is likely to be an unpleasant, uncomfortable, and degrading experience. Digital rectal searches are not condemned *per se*, . . . and until a kinder, gentler method of satisfying the particular security concern is devised, they will be conducted." Del Raine only sought relief under the eighth amendment, that the search was "cruel and unusual" rather than under the fourth amendment that the search itself was unreasonable.

The court upheld dismissal of the rectal probe claim, citing numerous cases on the issue. The appeal focused on the psychological harm caused by such searches because the eighth amendment is not limited to physical harm. "There is no question that such a search may be psychologically harmful and as the appellant in this case recounted - the search may be 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive...' Undoubtedly, every inmate having to submit to a rectal search bears this psychological harm. However, the fact of the matter is that rectal searches in the prison are necessary, and therefore, such psychological harm is unavoidable." Despite the danger to prisoners' lower intestine and prostate glands during such searches, the court found no eighth amendment violation. Readers will note that Del Raine was also X-rayed, twice, after the probes. No contraband was found.

The court affirmed dismissal of the due process claims involving the loss and destruction of Del Raine's property. The property at issue involved the loss, destruction, damage and disturbance of his legal papers, books and personal property. The court held that he had an adequate post-deprivation remedy under the Federal Tort Claims Act (FTCA) and could not sustain a *Bivens* claim against the individual guards who destroyed his property. See: *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994). ■

9th Cir Reverses Dismissal of Publisher Only Rule

PLN rarely reports on unpublished decisions because they cannot be cited as binding precedent. But in some cases prisoner litigants benefit from knowing cases that have been decided by the courts in their relevant circuits as well as new avenues of attack on issues that have been lost in the past. In *Bell v. Wolfish*, 441 US 520 (1979) the supreme court upheld a prison regulation which mandated that hardcover books could be sent only by the publisher, this has become known as the "publisher only" rule.

Since that ruling numerous prison systems have enacted rules which mandate that even soft cover books and magazines must come from the publisher. This practice has been upheld by several courts. See: *Ward v. Washtenaw County Sheriff's Dept.*, 881 F.2d 325 (6th Cir. 1989); *Hurd v. Williams*, 755 F.2d 306 (3rd Cir. 1985); *Kines v. Day*, 754 F.2d 28 (1st Cir. 1980) and *Cotton v. Lockhart*, 620 F.2d 670 (8th Cir. 1980). However, the ninth circuit has yet to decide the issue. The closest they have

come is *Johnson v. Moore*, 926 F.2d 921 (9th Cir. 1991) in which it court reversed the dismissal of a challenge to Washington state DOC's "publisher only" rule for consideration of injunctive and declaratory relief. That case was later vacated, at 944 F.2d 1533, because the plaintiff was transferred out of Washington, see: *Johnson v. Moore*, 948 F.2d 517 (9th Cir. 1991).

Rick Sindars, a prisoner at the Washington State Reformatory filed a challenge to the "publisher only" rule in the federal court in Seattle. After initially ruling in his favor, judge Rothstein reversed herself and dismissed the suit. Sindars appealed and in an unpublished memorandum order the ninth circuit court of appeals reversed and remanded. The court remanded finding that Sindars had presented a triable issue of fact. While DOC rules mandated that all published materials come from the publisher, a WSR rule allowed prisoners to receive bibles, religious books, textbooks and diaries in personal packages directly

from family and friends. Sindars contended that this exception indicated that the publisher only rule was not reasonably related to keeping contraband out of prison but was, instead an exaggerated response to prison security concerns.

The appeal court agreed, holding that the exception to the publisher only rule might lead a trier of fact to conclude the policy was "arbitrary or irrational." Noting that the above courts have upheld publisher only rules, the court stated "However, none of these cases considered whether the allowance of exceptions to the rule undermined the asserted interest of the prison in maintaining security." The case was remanded to the lower court for a trial. The court also vacated the award of costs which had been taxed against Sindars because the state was no longer the "prevailing party." See: *Sindars v. Riveland*, 9th Cir. No. 93-35433, DC No. CV-91-1547-BJR. Again, this is an unpublished opinion that cannot be cited for precedent purposes. ■

Guard Sues Over Discrimination Order

This case involves a black California prison guard, Ali Moyo, who sued his superiors in the California Department of Corrections (CDC) after they fired him for protesting against and refusing to cooperate with the defendants' practice of allowing white prisoners, but not black prisoners, to shower after their work shifts. He filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The district court dismissed the suit under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. The court of appeals for the ninth circuit reversed and remanded. In its ruling the appeals court gave a useful analysis of how Title VII applies to prisoners as well as their captors in prison. It also discusses prisoner labor laws.

The appeals court notes that employees state a cause of action under Title VII when they show they engaged in a statutorily protected activity, "i.e. that he protested or otherwise opposed unlawful employment discrimination directed against employees protected by Title VII," were subsequently disciplined or fired and a causal link exists between the protected activity and the ad-

verse action. The court notes that it is not necessary for the employment practice to actually be illegal, only that the employee acted on the "reasonable belief" that the employer had engaged in an unlawful employment practice. The CDC argued that under Equal Employment Opportunity Commission (EEOC) decision No. 86-7, April 18, 1986, prisoners working within prisons were not considered "employees" within the protection of Title VII.

The court rejected that argument and reversed on three separate grounds. If Moyo can show that he was fired for refusing to carry out the CDC's alleged practice of refusing showers to black prison workers, this constitutes an unlawful employment practice in and of itself, i.e. conditioning Moyo's employment on discrimination. "If Moyo can demonstrate at trial that he was discharged for refusing to implement a policy that discriminates against blacks, he has stated a claim under that section and the question whether the inmates are 'employees' under the Act becomes wholly irrelevant."

Of interest to prisoner litigants is that the court noted that as "our decision in *Baker*

v. McNeil Island Corrections Center, 859 F.2d 124 (9th Cir. 1988), makes clear, inmates performing work assignments that include compensation or training, or that resemble work release rather than forced labor, are employees entitled to Title VII protection. In *Baker*, we reversed a district courts dismissal of a prison inmates Title VII claim that he was discriminatorily denied employment in a prison library. We noted that the position as a library aide, while not work release, paid a salary and included some training." Thus, Moyo could state a claim if the prisoners at issue in this case performed work assignments other than forced labor. Because the complaint did not discuss the prisoners' status in detail this matter was remanded to the lower court for a factual determination.

The court also held that even if the prisoners ultimately did not qualify as employees under Title VII Moyo could still prevail on his claim as long as he can show he "reasonably believed" he acted in good faith by refusing to discriminate against black prisoners. The case was remanded back to the lower court. See: *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994). ■

Prisoners Entitled to Free Legal Mail Postage

Several prisoners at the Iowa Men's Reformatory (IMR) filed suit under 42 U.S.C. § 1983 seeking injunctive relief from the prison's policy of denying indigent prisoners in administrative segregation any free legal or personal postage. Prisoners in ad seg are not allowed to earn money from prison jobs nor are they provided any allowance for stamps or other expenses, thus, they have no source of funds by which to buy postage. These prisoners are allowed to go into debt for legal mail postage but once their balance is in the red the IMR imposed a 50 cent a month "service charge." Once the negative balance reached \$7.50 the prisoner had to show "exceptional need" to prison officials before any further funds would be advanced for legal mail. Prison officials had unfettered discretion to determine when "exceptional need" existed.

No free postage was allowed for personal mail.

After a trial, the lower court held that the policy as applied to legal mail was unconstitutional and issued an order forbidding it but it upheld the ban as applied to personal mail. The court enjoined the practice of imposing a 50 cent a month service charge on negative balances due to the purchase of legal mail postage; enjoined the practice of requiring prisoners with balances below \$7.50 to show "exceptional need"; and ordered the IMR to provide indigent prisoners with at least one free stamp and envelope per week for purpose of legal mail. Both parties appealed and the court of appeals for the eighth circuit affirmed.

On appeal the defendants claimed that the prisoners had to show that they had actually been harmed by a denial of their right of access to the courts before the

court could issue an injunction. The appeals court disagreed, noting that "a systemic denial of inmate's constitutional right of access to the courts is such a fundamental deprivation that it is an injury in itself."

"We sympathize with the inmates's contention that it makes little or no penological sense for an institution to impede inmate's maintenance of familial contact. We also agree that such policies seem especially infirm when applied to inmates who are troubled and having problems adjusting to the prison environment. However, regardless of our sympathies, indigent inmates have no constitutional right to free postage for nonlegal mail." The lower court ruling was affirmed on both issues. See: *Hershberger v. Scaletta*, 33 F.3d 955 (8th Cir. 1994) and 861F. Supp.1470 (ND IA 1993).■

Damage Awards Can be Used for Restitution

Under Iowa state law all felons must pay victim restitution. The DOC sets up a restitution plan whereby up to half of a prisoner's earnings can be confiscated and sent to the county court clerk who disburses the funds to the victims. Four Iowa state prisoners sued prison officials for constitutional violations and won, see: *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993). The state paid the damage awards to their attorney and when the money was deposited on their prison accounts prison officials seized all but \$50 of it from each prisoner to satisfy their obligations under the victim restitution act.

The prisoners applied to the district court for relief under Fed.R.Civ.P. 69(a). The district court held that the victim restitution act was preempted by § 1983. In *Hankins v. Fimmel*, 964 F.2d 853 (8th Cir. 1992), the appeals court held that the Missouri Incarceration Reimbursement Act was unconstitutional when prison officials sought to confiscate the money damages awarded to prisoners who successfully sued their captors for constitutional violations. It held that the statute was contrary to the goals of § 1983 which seek to ensure that federal constitutional injuries by state officials are compensated and redressed. The district court held that *Hankins* applied in this

case as well. The court of appeals for the eighth circuit reversed.

As a preliminary matter, the court held that the lower court may have lacked jurisdiction to hear the case because its jurisdiction was terminated when the judgment was unconditionally paid to the prisoners' lawyer. The appeals court went on to consider the merits of the case because the prisoners had initially filed suit *pro se*, the state had not objected and the issue could have been raised in a separate § 1983 action.

The court discussed the broad goals of § 1983 litigation and analyzed numerous cases where state laws were intended to pose an obstacle to § 1983 litigation. One of the goals of § 1983 litigation is to serve as a deterrent against future unconstitutional violations. In *Hankins* the court held that allowing prison officials to recoup the damages they paid for violating prisoners' federal rights would have a chilling effect on constitutional litigation as well as reward unconstitutional acts.

The court distinguished this case from *Hankins* holding that restitution usually goes to private individuals or institutions and held that victim restitution does not defeat § 1983's deterrent

goal nor that it was intended to interfere with § 1983 litigation. In *Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), the court held that Iowa lien law governs the priorities of private creditors who assert rights to a prisoner's § 1983 damage recovery. Neither the lower court nor the appeals court ruled on the plaintiff's claim in this case that the manner in which the money was deducted from their account violated state law. The appeals court held that the deduction may or may not give rise to a federal claim. But in this case the lower court lacked jurisdiction to consider it as part of this original case after it had been settled. It is worth noting that the prisoner plaintiffs could have easily avoided having their money award confiscated. The money was originally given to their attorney. Had the attorney retained the money until their release, deposited it in a bank account or delivered it to a family member, the DOC would not have been able to seize the funds. The moral to this story is Iowa prisoners who receive settlements or damage awards should ensure the state isn't able to gain control of the funds again. See: *Beeks v. Hurdley*, 34 F.3d 658 (8th Cir. 1994).■

WA DOC Sanctioned in Grievance Mail Case

In the September, 1994, issue of *PLN* we reported *O'Keefe v. Murphy*, the unpublished case by US District Judge Alan McDonald which held that prisoners' mail to and from different government agencies was entitled to confidential treatment, i.e. being opened only in the prisoner recipient's presence without being read by prison officials. The state filed a motion for reconsideration. On August 8, 1994, Judge McDonald denied the motion and granted sanctions against the DOC for not complying with his earlier order. This time the order has been published.

Timothy O'Keefe, a prisoner at the Washington State Penitentiary (WSP) had filed suit seeking declaratory and injunctive relief because WSP officials refused to treat as "legal mail" letters he wanted to send to different government officials. The court granted summary judgment in O'Keefe's favor holding that mail to government officials is protected by the first amendment's right to petition the government for the redress of grievances. The court held that allowing prison officials to read such mail would result in a chilling of prisoners' right to petition government officials. In its earlier order the court held that Division of Prisons (DOP) Policy 590.500 was unconstitutional and ordered prison officials not to open "grievance mail" outside of prisoner's presence.

In the new order the court ruled on O'Keefe's motion for sanctions because WSP officials had not removed a mail room sign inconsistent with the court's earlier order. The state also sought reconsideration of the previous order. The court denied the defendants' motion for reconsideration holding that it had correctly relied on the appropriate case authority cited in the initial order. The court also held that O'Keefe had shown a reasonable subjective fear that he would be retaliated against for complaining of prison conditions to government officials, thus he was entitled to injunctive relief.

The court again rejected the defendant's contention that treating prisoners' grievance mail as legal mail would significantly increase their administrative costs. Noting that it was only recently that WSP officials began opening grievance mail outside of prisoners' presence, suggests that the costs were not excessive.

In granting O'Keefe's motion for sanctions the court held that a WSP mail

room sign which did not include grievance mail in its definition of "legal mail" violated the court's earlier order by including the text of the unconstitutional DOP mail policy. "It is hereby ordered that defendants perform one of the following: (1) removing mail room signs containing the text of DOP Policy 450.100; (2) amending mail room signs containing the text of DOC Policy 450.100, to include grievance mail as a category of legal mail; or (3) amending mail room signs containing the text of DOC Policy 450.100, by adding a separate provision providing that grievance mail will be treated similarly to legal mail." The order also states: "Note that defendants have not been ordered to educate the prisoners on their grievance mail rights. However, if defendants choose to educate prisoners regarding their mail rights, as by posting signs, they cannot make statements denying the prisoners' grievance mail rights."

After the initial order was issued, WSP warden Tana Wood told O'Keefe that in order for government agencies' responses to be processed as legal mail it would have to be marked as such. O'Keefe contended that conditioning his right to confidential treatment of his mail upon third parties' labeling their mail was unreasonable and the court agreed. "...imposing upon inmates' correspondents the responsibility of labeling incoming grievance mail, defendants unconstitutionally impinges (sic) on prisoners' grievance mail rights. Defendants may impose a labeling requirement, but only if the inmate, not his correspondents, remain responsible for labeling the incoming mail. An automatic-labeling requirement, such as requiring an inmate to add to his return mailing address the phrase 'grievance mail' or 'legal mail' if he wished responsive mail to be considered grievance mail, would be valid." The court amended its permanent injunction in the case to include the responses sent by government officials to prisoners.

In its order the court notes that it has received complaints from other Washington state prisoners to the effect that the DOC is not complying with the injunction, i.e. prison officials are opening their grievance mail outside their presence. The court's order states that the injunction applies to *all* Washington state prisoners, not just O'Keefe. Moreover, the injunc-

tions are permanent, not temporary and have not been stayed. "The court anticipates that defendants will comply fully with the injunctions, but the court is prepared to act on any violations." The injunction applies to all Washington state prison facilities and Washington prisoners should bring any cases of non-compliance with the court's order to Judge McDonald's attention. [See September, 1994 *PLN*.] His office is in the US District Court in Spokane, WA. The case is: *O'Keefe v. Murphy*, 860 F. Supp. 748 (ED WA 1994).■

NC Consent Decree Modified

In 1985 North Carolina state prisoners filed a class action suit seeking relief from unconstitutional conditions at 49 of the state's 97 prison facilities. During trial the parties settled and entered into a consent decree which limited overcrowding to 140% of capacity in medium security facilities and 120% of capacity in minimum security facilities. The consent decree also covered numerous other areas of prison conditions and provided for continued court jurisdiction of the case. After signing the agreement North Carolina's prison population began to dramatically increase, far more than initially projected when the decree was signed. Prison officials asked the court to modify the decree to allow still more overcrowding than that allowed by the decree. The district court granted their motion to modify the decree in part and denied it in part.

The court gave a lengthy history of the case and the rise of prison admissions in North Carolina and the relevant case law by which consent decrees may be modified at the party's request. The court denied the state permission to increase the prisoners housed in older dormitories to 130% of their capacity. The court granted the defendant's motion to house prisoners in new dorms at 125% of their rated capacity. This case is highly fact specific to North Carolina. See: *Small v. Hunt*, 858 F. Supp. 510 (ED NC 1994).■

OK Prisoners Have Disc. Hearing Remedy

In the May, 1994, issue of *PLN* we reported *Waldon v. Evans*, 861 P.2d 311 (Okla. Cr. 1993) which held that Oklahoma state courts could hear prisoners' challenges claiming due process violations in prison disciplinary hearings. In a new ruling, the Oklahoma Court of Criminal Appeals has further clarified both the right and the scope of review available for such claims. This ruling applies only to Oklahoma state prisoners.

Two Oklahoma state prisoners sought habeas relief in federal court claiming that they had been denied their right to due process in prison disciplinary hearings that had resulted in the loss of good time credits. The federal court certified a "Question of Law" and sent it to the state court for an interpretation of the applicable state laws and statutes before it issued its ruling. This is the state court's reply to that request. The state court made no determination as to whether the prisoners were entitled to relief, it merely outlines the procedures available to them to assert their due process rights. The federal court wanted to know if there was an adequate state remedy for Oklahoma prisoners wrongfully deprived of their good time credits. The state court said there is.

This case is somewhat novel in that it is the first case certified to the state court under the Uniform Certification of Questions of Law Act, 20 O.S. 1991, §1601-1611, which allow federal courts to ask questions of Oklahoma state law to the relevant state courts, essentially issuing an advisory opinion in cases where the state court lacks jurisdiction. The state appeals court held that the Act conferred the necessary authority upon it to answer the question of law presented.

The state court held that Oklahoma prison officials have a duty to guarantee that prisoners receive the good time credits they have earned and to ensure that due process is given before such credits, after being earned, are revoked. The court discusses the scope of writs of mandamus and concludes that they are not the appropriate vehicle for prisoners to challenge the loss of good time credits. But mandamus is the appropriate means for prisoners to challenge not be-

ing afforded due process at disciplinary hearings where good time credits are taken. It also discusses prisoners' right to administratively appeal adverse disciplinary decisions. Noting that even criminal appeals are granted by statute and not as a matter of right, the court held that the state Administrative Procedures Act does not mandate that prisoners be allowed to appeal disciplinary hearings. Nor is such a right to appeal created by the earned time statute.

The court held that prisoners have a state court remedy by seeking mandamus after previous earned good time credits are taken. "This remedy ensures a timely record is made of the granting and revoking of earned credits. The inmate also has a complaint at such time as he or she is entitled to immediate release; and this Court has held the writ of habeas corpus is appropriate in that instance... Thus, the inmate does have a state remedy at the appropriate time, i.e. when he is eligible for release. The question then becomes a matter of timing for the inmate's access to the state remedy." "But before that time, this Court finds no statutory authority to render an opinion which has no effect on an inmate's judgment and sentence. Such a ruling is prohibited as it would be advisory only..." The court held that it believes the Legislature has refused to allow state courts to get involved in the earned time credits business.

The shortcomings with the court's approach to this matter are apparent: prisoners cannot seek a state court review of the loss of their good time until such time as they are due to have been released. Thus, even if they prevail they will likely have spent that time in prison litigating the habeas petition. Readers should note that in past issues of *PLN* we have reported numerous federal court decisions, including the recent supreme court ruling in *Heck v. Humphrey*, which have held that a 42 U.S.A. § 1983 remedy exists when prisoners are deprived of their good time credits in a manner that does not comport with federal due process. Oklahoma prisoners seeking to challenge this issue may want to research this issue. See: *Canady v. Reynolds*, 880 P.2d 391 (Okla. Cr. 1994). ■

MS Jail Officials Held In Contempt

In 1978 prisoners at the Madison County jail in Mississippi filed a class action suit challenging conditions at the jail. Prior to going to trial the parties negotiated a consent decree incorporating a wide range of issues, everything from racial discrimination to the types of combs that prisoners at the jail would be given. For the next decade the district court monitored the case and the plaintiffs filed three motions for contempt of court claiming the defendants had failed to abide by the terms of the decree. Each time the court denied the contempt motion after jail officials complied with the decree. A new jail was opened and the jail officials essentially abandoned the decree. The plaintiffs initiated contempt proceedings and the defendant jail officials motioned the court pursuant to Fed.R.Civ.P. 60(b) to modify the decree. The district court denied the defendant's motion and held them in contempt, finding that since the new jail opened they had "ceased making any attempt to abide by the conditions set out in the Final Judgment..."

The defendants appealed and the court of appeals for the fifth circuit affirmed, upholding both the contempt finding and the refusal to vacate the consent decree. Review of consent decrees dealing with institutional jail reform is governed by *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748 (1992). The reviewing court owes substantial deference to the lower court's experience in handling this type of litigation, which typically span many years. A district court's denial of jail prison officials motion for relief from final judgment under Fed.R.Civ.P. 60(b) is reviewed for an abuse of discretion. Defendants in consent decree cases are entitled to relief from the decree, i.e. to modify it or otherwise avoid complying with it as written, if they can show either a significant change in factual conditions or in the law.

Jail officials in this case contended that the opening of a new jail which housed more prisoners than the old jail; which receives prisoners from other agencies with more diverse criminal histories; most of whom are pretrial detainees; and no longer includes mental

patients or juveniles. The appeals court notes that changed factual circumstances in and of themselves are not sufficient grounds for relief from a consent decree. To meet their burden under *Rufo* the petitioning officials must show, in addition to the changed factual situation: "(1) show that those changes affect compliance with, or the workability or enforcement of, the final judgment, and (2) show that those changes occurred despite the county officials' reasonable efforts to comply with the judgment. The county officials have met neither requirement."

The court also held that the supreme court's ruling in *Wilson v. Seiter*, 501 US 294, 111 S.Ct. 2321 (1991) did not constitute a change in the law sufficient to modify the decree. While the decree encompassed many issues not required by the constitution the jail officials chose to enter into the decree and were thus bound by their agreement. "...*Wilson* is not a change in law that would satisfy the *Rufo* requirements because it is not applicable to the enforcement of a consent decree."

The contempt ruling was based on the lower court finding, upon plaintiff's motion, that numerous violations of the decree had occurred. This included but wasn't limited to: beatings of prisoners, denial of adequate medical care, denial of access to the exercise yard, overcrowding, punishment without notice or cause, denial of toiletries and hygiene items, denial of clean linen and bath clothes, ignoring health guidelines in serving food, not supplying special meals for prisoners with special religious or medical diets, limiting prisoner's access to legal services and their attorneys, hampering phone access and access to reading material, and understaffing. In light of these findings the defendants argued on appeal that they were in "substantial compliance" with the decree which did not warrant the contempt finding. The appeals court rejected this argument as being meritless and upheld the contempt finding. See: *Cooper v. Noble*, 33 F.3d 540 (5th Cir. 1994). ■

CDC Must Establish Hobby Program

Lassen County Superior Court Judge J. Harvey issued a writ of habeas corpus on August 16, 1994, which ordered the California Department of Corrections (CDC) to establish a hobby program and store materials at the California Correctional Center (CCC) at Susanville. Steve Yakle, a CCC prisoner, was transferred to CCC from Folsom, where he participated in a hobby program. Upon arrival at CCC he was informed that the prison had no hobby program nor would it store the hobby materials he had purchased at Folsom. Yale filed a writ of habeas corpus contending that California prison rules required CCC to have a hobby craft program. Judge Harvey agreed.

Under Section 3100 of Penal Code section 5058, CDC wardens are required to establish prisoner handicraft programs. The court held that this statute is a mandatory obligation which leaves the CDC no discretion as to whether they will abide by it or not. The court rejected the CDC's argument that they have the authority to authorize the abolition of the required handicraft programs. The court notes that to do so, the CDC needs to comply with the methods outlined in the state Administrative Procedures Act (APA). "The requirements of the Administrative Procedures Act are binding on the Director of Corrections"

"Therefore, the court orders the respondents CDC and CCC to carry out the mandate of CCR section 3100 and to establish a handicraft program at CCC....instead of establishing such a program at CCC, the Director may amend or repeal section 3100. Of course, he has the right to do that. But, for so long as section 3100 remains in its present form, CCC is required to provide a handicraft program; and, in order to meet budget constraints, any necessary funds have to be diverted from some program where there is no regulatory or statutory mandate or they have to be obtained by reducing other mandated programs."

The court also ordered the CDC to provide storage space for Yakle's hobby supplies because the transfer was not for disciplinary reasons and it was no fault of his that CCC did not have a hobby program. In the event section 3100 is repealed or amended by the CDC they were ordered to provide Yakle with storage space for his hobby materials. This is an unpublished order which cannot be cited as precedent. However, it may be useful to California state prisoners faced with the same problem elsewhere in the CDC. See: *In the Matter of the Petition of Steve Yakle*, Case No. CCW 921. ■

Contempt Finding Reversed

In 1980 prisoners at the Iowa State Penitentiary (ISP) entered into a consent decree, *Dee v. Brewer*, with prison officials which prohibited guards from searching or removing prisoners' legal papers from their cells when the prisoner was not present, unless exigent circumstances existed. In 1993 ISP officials received a tip claiming that Ronald Mahers possessed drugs. A search was conducted of Mahers' unit; his cell and that of 11 other prisoners were searched. During the searches Mahers and the other prisoners were asked to sign a waiver of their right, under the consent decree, to be present while their legal materials were searched. They refused to do so. Mahers filed a grievance claiming that the search outside his presence of his legal materials violated the decree. The grievance response agreed that it did but afforded him no remedy. The 12 prisoners then filed suit under 42 U.S.C. § 1983 and for contempt under the *Dee* decree. The court dismissed the § 1983 claim but the contempt action proceeded to trial.

The court found that ISP warden Hedgepeth had allowed his staff to violate the consent decree and failed to train them to comply with the decree's requirements. The court fined Hedgepeth \$6,000, awarded nominal damages of \$25 to each prisoner and attorney fees of \$4,800. Hedgepeth appealed and the court of appeals for the eighth circuit reversed and remanded with orders to vacate the contempt finding.

The appeals court held that the district court had held the warden in contempt for conduct not proscribed "within the four corners" of the *Dee v. Brewer* decree. The court reached this conclusion because the decree did not incorporate by reference the ISP compliance policy. However, the appeals court did not address the fact that prison staff did not comply with the plain language of the decree banning the searches of prisoners' legal materials. It only addressed whether the searches complied with the ISP compliance policy. Because the policy was not part of the decree, the court held that Hedgepeth could not be held in contempt for failing to abide by it. This appears to be a case where the appeals court has bent over backwards to vacate a contempt decree where it was appropriately entered. Consent decrees that are not enforced are not much protection to constitutional rights. See: *Mahers v. Hedgepeth*, 32 F.3d 1273 (8th Cir. 1994). Two other recent cases involving enforcement of the *Dee* consent decree are: *Wycoff v. Hedgepeth*, 34 F.3d 614 (8th Cir. 1994) and *Aldape v. Lambert*, 34 F.3d 619 (8th Cir. 1994). ■

Tight Handcuffs State Claim

Ronald Davidson is a New York state prisoner. While being transported to the segregation unit of another prison he was handcuffed and shackled. The devices were so tight that they cut into Davidson's flesh and reduced circulation into his hands and feet, causing swelling. As a result his ankle is permanently scarred and his wrists were numb for several months afterward. Davidson filed suit in federal court pursuant to 42 U.S.C. § 1983 claiming that the tight shackling violated his right to be free from cruel and unusual punishment. He also claimed that he was denied medical care to the injuries resulting from the shackling and that this too violated his eighth amendment rights. The district court dismissed the complaint pursuant to Fed.R.Civ.P. 12(c) as a judgment on the pleadings. The court of appeals for the second circuit reversed and remanded.

The court of appeals gave a brief discussion of the legal standards lower

courts must use in reviewing prisoners eighth amendment claims. *Hudson v. McMillian*, 112 S.Ct. 995 (1992), held that when prison officials are accused of using excessive force the core judicial inquiry, set forth in *Whitley v. Albers*, 475 US 312, 106 S.Ct. 1078 (1986), is whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Eighth amendment claims also have objective and subjective components. The objective component concerns the seriousness of the injury, or if no permanent injury results, the use of excessive force. The subjective component refers to the defendants' state of mind when they commit the violation.

Using this standard the appeals court concluded that Davidson's complaint adequately set forth all the elements of an eighth amendment violation: the handcuffs were too tight, leading to serious and permanent physical injury (the objec-

tive component), and the excessive force was applied in a wanton and malicious manner in retaliation for being a jailhouse lawyer (the subjective component). The lower court erred when it limited its inquiry as to whether the restraints were justified. "The claim is not based on the use of handcuffs, but on their deliberate and improperly motivated application so tightly as to injure." The court held that material issues of fact existed as to whether Davidson was an escape risk requiring the defendants to be shackled so tightly as to cause severe pain and permanent injury. And, if not, whether the defendants used such excessive force in retaliation for Davidson's litigiousness.

Davidson also stated a claim that his access to medical care was intentionally delayed or denied. While the pleadings were adequate that does not mean they could not be dismissed at a later stage of the proceedings. See: *Davidson v. Flynn*, 32 F.3d 27 (2nd Cir. 1994). ■

No Immunity for Sweat Lodge Denial

Ralph Thomas is a Nebraska state prisoner. He filed suit under 42 U.S.C. § 1983 claiming that prison officials had violated his right to religious freedom by denying him daily access to the prison's sweat lodge for prayer. He claimed this denial also violated his right to equal protection because members of other faiths were allowed daily access to the prison chapel for prayer. The district court granted the defendants' motion for summary judgment. The court of appeals for the eighth circuit reversed and remanded holding there were material issues of fact in dispute precluding summary judgment. The court also held that prison officials would not be entitled to qualified immunity for their actions unless they could show a rational relationship between legitimate penological interests and denial of sweat lodge access.

The appeals court rejected the defendant's bald allegation that "security concerns" motivated their decision to prohibit Thomas from praying in the sweat lodge on a daily basis. This was

an insufficient basis for the court to conclude that there was any rational relationship between the denial of access and security. The court analyzed the claims under the reasonableness test set forth by the supreme court in *Turner v. Safely*, 482 US 78, 107 S.Ct. 2254 (1987). The court held there was insufficient evidence in the record to support summary judgment in the defendants' favor because they did not address how daily access to the sweat lodge would affect prison resources nor whether alternative policies would have accommodated Thomas. The court remanded the case for a trial on the merits to resolve the factual matters in dispute.

The defendants asserted that even if they did violate Thomas' rights they were entitled to qualified immunity because they did not do so with the malicious intention to deprive him of his constitutional rights. The appeals court rejected that argument noting that since at least 1972 prisoners have a well established right to practice their religion in a manner comparable to that afforded members of majority faiths (i.e. Chris-

tians). The court held it could not say that the defendants had acted reasonably in denying Thomas daily access to the sweat lodge for prayer. "If a rational relationship can be shown between legitimate penological interests and the denial of even brief access to the sweat lodge, such a denial may not have been unreasonable. In the absence of such a justification, the appellees would not be entitled to qualified immunity from § 1983 liability."

The defendants also claimed that Thomas' appeal in this case was barred by his failure to list all the defendant appellees in the caption of the appeal notice. The court gave a brief but insightful discussion of this issue noting that Federal Rule of Appellate procedure 3 (c) and numerous court cases only require that all appellants (the party appealing) be listed in the caption of the appeal notice, not the appellees (the winner in the lower court). The court held it properly had jurisdiction to hear the appeal. See: *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994). ■

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CA Prison Guards - A Potent Political Interest Group

By Dan Pens

There is a well fed political interest group feasting at the California public trough, and most taxpayers are unaware of the huge growth in this creature's appetite and political clout. It has grown from a political runt to one of the biggest hogs in the barnyard in an incredibly short span of time. This political interest group has swelled with such swiftness and cunning that most California taxpayers would not even recognize its name, much less realize how much of an impact it is having on their pocket-books and on the state's economy. I'm

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talking about the California Correctional Peace Officer's Association (CCPOA).

In 1980 there were 22,500 prisoners in California. The average salary for California prison guards was \$14,400 a year. The state budget for corrections was \$300 million per year. In the past, California schools and universities were the envy of the world. The state's economy was strong, bolstered by huge numbers of defense jobs. The California Correctional Peace Officer's Association (CCPOA) was a politically minuscule organization vying for attention among the giants of fat defense contractors.

In 1994 there are over 115,000 prisoners in California. The average salary for California prison guards is \$44,000 per year (\$53,000 with benefits)—\$10,000 more than the average teacher's salary. Prison guards require only a high school education and a six week training course. Most teaching jobs require a masters degree or at least an undergraduate degree in education. In 1993 California spent a greater portion of its state budget on corrections than it did for education for the first time (compared to as recently as fiscal year 1983/84 when California spent 3.9% of its budget on corrections, and 10% on higher education). The state corrections budget in 1994 was \$3 billion. The demise of the Cold War meant the decline of defense jobs. According to the National Commission for Economic Conversion and Disarmament, a non-profit Washington DC group, there has been a decline of over 750,000 defense related jobs in the last five years alone—most of them in California. But as the military-industrial complex is waning in California, the Prison-Industrial Com-

plex is mushrooming. Since 1984 California has added a whopping 25,900 prison employees, substantially more than has been added to all other state departments combined (16,000). By one estimate hiring for prisons has accounted for 45 percent of the growth in all California jobs since 1984.

The CCPOA's rise to political power can be traced to 1980 when Don Novey rose to the presidency of the CCPOA. Novey is the son of a prison guard. He graduated from American River College and served in Army intelligence in the late '60s. Then, before becoming the head of the union, he worked as a prison guard in Folsom.

Prior to Novey's ascendancy, the union had been a weak pitiful thing with a membership divided between the California State Employees' Association and the California Correctional Officers' Association. In all it had only about 5,600 members. But when Novey won control of its leadership, the union combined Youth Authority supervisors and parole officers with prison guards, and with the acceleration of prison building (California has built 19 new prisons since 1980), the CCPOA membership has swelled to 23,000 members.

Recognizing not only the political importance of lobbying but the power of public relations, Novey began spending about half a million dollars on PR and on honing a public image for himself: that of the self-deprecating, fedora-wearing, blue collar labor leader. But it is in the arena of political lobbying rather than PR that Novey has shown true genius.

The CCPOA collects nearly \$8 million a year in dues, and it expends, according

CA Guards (continued)

to the *San Francisco Examiner*, twice as much in political contributions as the California Teachers Association, although it is only one-tenth the size. The union is now second in the state only to the California Medical Association in political contributions. Don Novey has shaped the CCPOA into a potent political force. Candidates for governor have genuflected at Novey's feet in hopes of getting the endorsement and deep pocket largess of his association, and have submitted to grilling by the union leadership to see if they were worthy. Jack Meola, the CCPOA's executive vice president, says their questioning of candidates is intense. "Our primary goal is to protect the public," he says in his smooth PR banter to the press, "to keep thugs off the street and in jail where they belong." To fail the test, Novey maintains, could mean the difference between victory and defeat. Diane Feinstein found that out in 1990 when Novey's union gave almost \$1 million to enthrone law enforcement's friend, Pete Wilson, in the State House.

And, of course, the union not only wields the political stick, it also dispenses the carrot, and not just to Pete Wilson. Novey and his union contributed \$76,000 to the 1992 re-election campaign of David Elder, the chair of the state Assembly's Committee on Public Employment and Security — the very same committee that rules directly on the pay and benefits of prison guards. And they have received value for their political contribution dollars. Prison guards recently got raises six months ahead of other state government employees. Their average salary of \$44,000 per year is 58 percent above the national average for prison guards. And they now boast one of the best pension plans of any state employee. In addition to excellent medical coverage, they receive 75 percent of their salary at the time of retirement, which can be 55 after 30 years's service, and they get a 2 percent yearly increase after two years of retirement. To ward off the critics, Novey's PR machine drums up the theme that prison guards patrol "the toughest beat in the state." But that simply is not the case. As the *Los Angeles Times* pointed out, over the past three decades, 13 prison guards have been killed throughout the state compared with 63 officers in the LAPD—an organization with half the

members of the CCPOA's 14,000 members who serve as guards. (the rest of the 23,000 CCPOA members work in parole or as Youth Authority supervisors.)

The slick PR is aimed mainly at the public. State politicians don't need the propaganda to toe the CCPOA line. They know that one false step could result in Novey pulling a "Vasconcellos" on them. That is, the CCPOA richly endowing the campaign coffers of their opponent, as Novey's union did to John Vasconcellos, the chair of the state Assembly's Ways and Means Committee and an opponent of the prison building boom. Although it was generally conceded that Vasconcellos' seat was among the more secure in the Assembly, the CCPOA still laid more than \$75,000 in the lap of Vasconcellos' 1992 opponent just to let him know that it did not *appreciate* him signing the ballot argument against the prison-bond initiative in 1990, or questioning the fat contracts being awarded to prison guards at a time when the state was in the direst fiscal straights since the Great Depression. Vasconcellos was re-elected in 1992 with a substantial majority. But a clear, sharp message had been sent to the self-described "progressive" who has labored long and hard for a more thoughtful approach to crime and incarceration, and to any other state politicians echo might entertain the thought of publicly opposing prison-building legislation or criticize the guards' union.

The crowning glory of the CCPOA's political action campaign is without a doubt the passage of Proposition 184, the "Three Strikes" Initiative. The CCPOA contributed \$101,000 to get Prop 184 on the ballot. The CCPOA donation was clearly a key factor in getting the initiative on the ballot and on getting it passed. Even though the legislature had already been cowed into passing virtually identical legislation, the fact that it was passed

by voter initiative ensures that the legislature cannot easily modify this "Prison Guard Full Employment Act." CCPOA member, Lt. Kevin Peters, sums up the membership's position on "Three Strikes" when he says, "You can get a job anywhere. *This* is a career. And with the upward mobility and rapid expansion of the department, there are opportunities for the people who are [already] correction staff, and opportunities for the general public to become correctional officers. We've gone from 12 institutions to 28 in 12 years, and with 'Three Strikes' and the overcrowding we're going to experience with that [*CA already has the most overcrowded prison system in the US, operating at over 180% of rated capacity*], we're going to need to build at least three prisons a year for the next five years. Each one of those institutions will take approximately 1,000 employees."

But Lt. Peters, like the CCPOA as a whole, can see no farther than the end of the snout he has buried in the public trough. Though the public has been hoodwinked by crime fear hysteria fueled by the media and capitalized on by both political parties to gain the attention and affection of voters, critics are beginning to voice their doubt and concern over the direction these misguided policies are taking California. The once Golden State, whose public education system was the envy of the world, now ranks in the bottom 10 nationally in spending from kindergarten through high school. There are almost no meaningful drug rehabilitation programs in California, and almost no housing for the homeless; hospital emergency rooms are closing all over the state, libraries in L. A. County are closed on weekends, and many are open only two days a week; kids in some of the poorest neighborhoods have no place to go after school, and California now spends more on prisons than it does on colleges and

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universities. It is in a climate such as this that jack-booted reactionaries are able to sound the Nazi-like alarm that immigrants are the cause of the state's budget woes and the reason there are not enough jobs, schooling, medical and social services to go around.

Many corporations have fled California because of increased state taxes, and taken their jobs with them. Although the decrease in industrial jobs has been partly offset by increases in corrections jobs, it doesn't take a genius to see that this trend doesn't make for a viable economic strategy. As more and more working wage jobs are eliminated, the unemployed and the poor will have fewer and fewer economic opportunities. The state budget for health, education and social services will continue to be bled by the prison expansion programs. According to Jim Gomez, California's director of Corrections, it will cost \$40 billion to build the 21 new prisons required to house the surge in prisoners that "Three Strikes" (and similar "get tough" laws) will generate, and an additional \$5.5 billion a year to run them. A RAND Corporation study predicts the corrections budget will double, growing from 9 percent of all state expenditures to 18 percent. It also predicts that prosecution costs will soar. "To support implementation of the law, total spending for higher education and other government services would have to fall by more than 40 percent over the next eight years," the RAND report concludes. The CCPOA is spearheading a political and economic strategy that will lead California into an abyss.

But perhaps this is the only direction that may lead to eventual social and economic justice. The prospects for *evolutionary* shifts to the left grow dimmer and dimmer. Perhaps it is only after the state drives itself into an abyss that a radical *revolutionary* shift can take place. That remains to be seen. ■

Sources: LA Weekly, Orange County Herald, Sacramento Bee, et al.

WI Guard Indicted for Mail Obstruction

In the October, 1994, issue of *PLN* we reported that U.S. Postal investigators were investigating the discovery of large quantities of prisoner mail found in the garbage at the Waupun Correctional Institution in Wisconsin. On December 8, 1994, the US Attorney for the Eastern Dis-

trict of Wisconsin, Thomas Schneider, announced that Waupun prison guard James Ehrenburg had been charged with a violation of 18 U.S. § 1701, "Obstruction of the Mails." This charge is a misdemeanor and Ehrenburg faces a maximum penalty of 6 months imprisonment and a \$5,000 fine if convicted.

The one count indictment reads: "The United States attorney charges that on or about July 26, 1994, in the State and Eastern District of Wisconsin, James T. Ehrenburg, the defendant herein, did knowingly and willfully obstruct and retard the passage of mail by discarding first class mail addressed and intended for delivery to inmates of the Waupun Correctional Institution; in violation of Title 18, United States Code 1701." Dated: December 6, 1994.

Since we began publishing, *PLN* has had delivery problems at Waupun. Upon learning of the discovery of prisoner's mail in the garbage at Waupun we also contacted the US Attorney's office and provided him with an affidavit concerning the "disappearances" of *PLN* and expressed our concern about the first amendment issues involved. Given that theft and illegal disposal of prisoner mail is a common problem across the country it is worth noting that there are laws against it and in some cases postal inspectors actually do investigate the matter. ■

Liability for Filming Search Affirmed

In the November, 1994, issue of *PLN* we reported *Ayeni v. Mottola*, 848 F Supp 362 (ED NY 1994) which denied qualified immunity to Secret Service (SS) agents who allowed a CBS television crew to film the search of a family's home. The Ayeni family was suspected of being involved in a fraudulent credit card operation and a search warrant was obtained to search their home for evidence of illegal activity. SS agents searched the home for three hours and during the search a camera crew from CBS' *Street Stories* filmed the events inside the home, without the Ayeni's permission. No evidence of illegal activity was found. The Ayenis' filed suit claiming that the filming of the search warrant execution violated their fourth amendment right to be free from unreasonable searches and seizures. The SS agents filed a motion for

summary judgment claiming they were entitled to qualified immunity for their actions. In the above ruling the district court denied their motion. That ruling has been affirmed by the second circuit court of appeals.

The appeals court discussed both the fourth amendment's requirements for reasonableness and its protection of citizen's privacy and the extensive body of case law behind it. The court concluded that no reasonable law enforcement officer could have thought that allowing a television film crew to accompany it during the execution of a search warrant could be lawful. Search warrants limit who may execute them, namely law enforcement officers or the rare occasion where an expert may be required to search for evidence. The SS agents were liable because the law is well established that "A private home is not a sound stage for law enforcement theatricals."

This conduct was especially unreasonable because the film crew was brought into the Ayeni family's home for the very purpose of inflicting injury to their fourth amendment right to privacy. The appeals court agreed with the lower court that filming images inside a home constitutes a "seizure" for fourth amendment purposes. The court remanded the case back to the lower court for trial where issues of fact remained in dispute concerning other conduct during the search. CBS is no longer a party to the suit having made an undisclosed settlement to the Agents. It is worth noting that this type of finding of liability against both police agencies and, most importantly, the television broadcaster, have the potential of removing the crude police propaganda shows that capitalize on people accused of illegal activities and jackbooted police tactics. This is the first reported case dealing with this issue. See: *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994). ■

AG Mail Must Be Treated as Legal Mail

Rakim Muhammad is a Michigan state prisoner. He challenged a Michigan Department of Corrections (MDOC) policy of treating mail to prisoners from the state Attorney general's office as ordinary mail, i.e. opened outside the addressee's presence, rather than as legal mail where it is opened by prison officials only in the recipient's presence and is not read. The policy was stated in

AG Mail (cont.)

a memo from the Administrator of the MDOC's Hearings Division and stated that "mail to a prisoner from the Attorney General's Office need not be treated as legal mail and thus confidential." After a piece of mail from the AG's office addressed to him was opened outside his presence Muhammad filed suit. The district court found the policy to be unconstitutional and the court of appeals for the sixth circuit affirmed.

The MDOC defendants argued that prisoners have no interest regarding the confidentiality of mail from the AG's office because the AG's office represents the prison and is thus adverse to prisoner's interests. The appeals court rejected this as indicating "a surprising lack of imagination." Noting that prisoners may write to the AG's office for a variety of reasons, such as seeking legal remedies, negotiate future prosecutions, complain about prison conditions, seek consumer protection, etc. "Indeed, many divisions in the Michigan Attorney General's Office—including Civil Rights and Civil Liberties, Consumer Protection, Criminal, Environmental Protection, Mental Health, Public Health—could take action on behalf of an inmate, or on behalf of the state based on information provided by an inmate, even against MDOC or its employees."

The MDOC argued that even if mail from the prisoner to the AG's office were entitled to confidentiality then the responses back to the prisoner were not. The court rejected this argument as meritless. "It takes very little imagination to realize that any response from the Attorney General to a confidential inquiry may well be sensitive and confidential itself." "The conclusion that mail from an attorney general to an inmate may be confidential should not be surprising, for courts have consistently recognized that 'legal mail' includes correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general." After citing numerous cases supporting this the court notes that it found no cases to the contrary.

The appeals court affirmed the entry of declaratory judgment in Muhammad's favor. "... under MDOC's policy, Muhammad reasonably expects his mail from the Attorney General to be opened

outside of his presence. Without declaratory relief from the court, this reasonable expectation could chill Muhammad from turning to the Attorney General's office under circumstances in which the office could otherwise be of service. Thus, the MDOC policy constitutes a roadblock upon an otherwise legitimate avenue for the redress of an inmate's legal problems or grievances."

Assessing the challenged policy under the "reasonableness" test enunciated in *Turner v. Safely*, 482 US 78, 107 S.Ct. 2254 (1987) the court concluded that the policy could not survive the challenge because no evidence showed that it advanced legitimate penological objectives nor that treating mail from the Attorney General's office as legal mail would cause any significant burden on prison resources or staff. Thus, the policy was unconstitutional under *Turner*. See: *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994).■

Police Report Inadmissible in Rape Case

William Miller is a Michigan state prisoner. He filed suit under 42 U.S.C. § 1983 claiming that he was subjected to cruel and unusual punishment when a prison supervisor and two guards were informed he was in danger, did nothing to protect him and he was subsequently raped by several prisoners. After a jury trial the district court entered a verdict in favor of the prison official defendants that held that the rape had not, in fact, occurred. The court of appeals for the sixth circuit reversed and remanded by holding that the lower court had erred in its evidentiary rulings.

That error involved the admissibility of Michigan State Police reports concerning the investigation of the rape charge, which were introduced into evidence despite Miller's hearsay objection to the documents. The reports in question were two police investigation reports where the alleged rapists denied committing the rape and the third was a statement from the county prosecutor declining prosecution because the victim, Miller, "lacked credibility" and there was insufficient evidence to show that a rape had occurred. The lower court admitted the documents under Fed.R.Evid. 803(8)(c) which establishes exceptions to the hearsay exclusionary rule. This particular sec-

tion exempts records or statements from public agencies that include "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

While the lower court's evidentiary rulings are reviewed under an "abuse of discretion" standard, appeals courts conduct a *de novo* review of the legal components of those determinations. While the lower court correctly concluded that the reports at issue were the records of a public agency for Fed.R.Evid. 803(8)(c) purposes, it was not a "factual document."

The reports at issue were not based on first hand observation or knowledge. The fact that interviews took place and that the prosecutor elected not to try the case were factual matters and were properly admitted into evidence. But the reports contained statements from the victim, alleged assailants, witnesses, etc. which were hearsay and should not have been admitted. Because "factual findings which are based on inadmissible hearsay, are not admissible under Rule 803(8)(C) because the underlying information is untrustworthy." In this case the reports did not contain factual findings or conclusions by the police agents who conducted the investigation but instead consisted mainly of statements from individuals who fall under no exception to the hearsay rule.

The appeals court held that the error in admitting the reports was not harmless because they served to convince the jury that the rape claim was fabricated. No other evidence of fabrication existed in the record and the witnesses mentioned in the reports were not called to testify at the trial. "The jury's determination that officials knew of threats against Miller and that he was assaulted, but not raped, make it virtually impossible to conclude that the error in question was harmless." The case was remanded for a new trial. See: *Miller v. Field*, 35 F.3d 1088 (6th Cir. 1994).■

6th Cir. Rules on BOP Phone Suit Pl

The March and November, 1994, issues of *PLN* both contained extensive articles about *Washington v. Reno*, the nationwide class action suit that challenges numerous aspects of the Inmate Telephone System (ITS) in the process of being installed at federal Bureau of

Prisons (BOP) facilities across the country. Copies of the above issues of *PLN* are still available for \$1.00 each so we will assume reader familiarity with the scope and nature of the litigation and just report on this preliminary ruling. Readers will note that this is not a ruling on the merits of the case, rather, the appeals court ruled on the BOP's appeal from the district court issuing a Preliminary Injunction (PI) enjoining several aspects of the ITS.

The appeals court held that because the BOP had made many of the changes the plaintiffs had initially sought in their lawsuit, the PI issued by the lower court should be dissolved in part, modified in part and remanded to the lower court for a hearing on the merits of the case. This published decision discusses numerous aspects of the case, both those at issue in the complete litigation and those at issue in this appeal from the PI.

The only issue in the suit decided on the merits by the appeals court was whether operation of the restricted direct dial had a chilling effect on prisoners' right to free speech and whether use of Commissary Fund Money to install and operate the ITS violated the statutory provisions concerning proper use of the fund.

While prisoners retain a first amendment right to reasonable phone access, see: *Johnson v. Galli*, 596 F. Supp. 135 (D NV 1984), there is no right to unlimited phone use, see: *Benzel v. Grammer*, 869 F.2d 1105 (8th Cir. 1989). Prisoners' right of phone access is "subject to rational limitations in the face of legitimate security interests of the penal institution." *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986). "The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions." *Fillmore v. Ordonez*, 829 F. Supp. 1544 (D KS 1993).

The appeals court held that the first amendment concerns raised in the initial complaint had been resolved by the BOP agreeing to allow prisoners to list up to 30 phone numbers that they can call, being able to add additional numbers at BOP officials' discretion "if legitimate justification for supplementing the list can be provided." The BOP also discontinued use of the form sent to would be phone call recipients that asked a number of personal and intrusive questions. Phone numbers listed by prisoners are now sup-

posed to be "ordinarily" placed on the prisoners' phone list unless a potential call recipient requests, in writing, to be stricken from the list. BOP officials may also not routinely eliminate courts, elected officials and members of the news media from prisoners' phone call lists. These changes addressed and remedied the first amendment and prior restraint concerns of the lower court when it issued the PI and thus lessened the prisoners' likelihood of success on the merits of their existing first amendment claims.

Extensive discussion was given to the history and role of 31 U.S.C. § 1321 (a)(22) and (b), the statutes which establish the BOP's Commissary Fund. The plaintiffs in this case argued that the BOP defendants were violating the terms of the trust fund by using it to finance the installation and operation of the ITS. They contend that the ITS is primarily a security related function which, because it excludes indigent prisoners and those who refuse to participate in the Inmate Financial Responsibility Program (IFRP), does not benefit or operate to benefit all prisoners. The lower court agreed with the plaintiffs on this matter and issued a PI enjoining use of CFM money to pay for the ITS.

The appeals court held that "The promulgation of the amendments to 28 CFR § 540 and 545, by significantly increasing the availability of collect phone calls in certain situations in comparison with the collect calls available under the initial Bureau of Prisons ITS proposal, resolves in large measure the complaint that the new telephone system improperly discriminated against indigent inmates and those not participating in the inmate financial responsibility program."

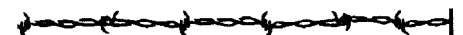
The court noted that 18 U.S.C. § 4007 requires that all expenditures relating to prison security come from the U.S. treasury. If commissary funds are used to pay for security aspects of the ITS then it would violate several laws. During the PI hearing BOP officials admitted they had purchased live monitoring equipment with commissary fund money but claimed that it was also used to check for complaints about static on phone lines and such, as well as to listen to prisoners calls. "Such dual purposes of the trust fund expenditures require a court to examine closely the primary function of the questioned purpose or operation." If the primary purpose is to educate, amuse or

serve the general welfare of prisoners then an incidental security aspect is irrelevant. "If, however, evidence establishes that the primary purpose of goods or services obtained with trust fund money is to provide for responsibilities 'attendant upon the confinement of persons' housed in federal correctional facilities, such illegal invasions of the trust must be enjoined. Otherwise, 'security costs' that were expended from the Commissary Fund, even if they may have also served a legitimate phone system function, will improperly deplete the balance of funds ultimately available to the inmates for other purposes."

"To the extent, however, that the fund is irreparably and illegally depleted for the primary purposes of prison security and inmate control, the inmates, the beneficiaries of the trust fund, can show that a limited injunction should issue to deter such violations by the trustee." This pinion of the PI was left intact by the appeals court. The court held that the BOP was not harmed by the PI because they could do what they should have done in the first place: ask Congress for money to fund the security aspects of their phone system.

The BOP also challenged the lower court's certification of a nationwide class of plaintiffs in the action. The appeals court rejected their argument that the injunction should only apply to the prison in Lexington, KY, where the suit originated. While BOP prisoners can't determine what distributions from the Commissary Fund should be made or for what, they are the sole beneficiaries of the fund and it applies to all BOP prisoners across the country, thus, certifying a class of plaintiffs was appropriate. "Because relief for the named plaintiffs in this case would also necessarily extend to all federal inmates, the district court did not err in granting wide-ranging injunctive relief prior to certifying a nationwide class of plaintiffs."

The district court's PI was modified "to prohibit only statutorily unauthorized purchases or expenditures from the Commissary Fund. In all other respects, the preliminary injunction is dissolved." The case was remanded to the lower court to proceed on to a hearing on the merits. We will report further developments in this case as they occur. See: *Washington v. Reno*, 35 F.3d 1093 (6th Cir 1994).■



Attorney General Subject to Suit

Cary Gagan is a Colorado state prisoner. He was convicted in state court of various crimes and his appointed counsel filed state court appeals on his behalf. Unsatisfied with that performance he filed a *pro se* habeas corpus action in federal court. In order to prepare for that action he filed a *pro se* motion in state court requesting that certain transcripts be prepared at government expense. The state court granted the motion. Assistant Attorney General Wendy Ritz ordered the court reporter not to prepare the transcript, despite the court order to the contrary, because she thought the petition would be dismissed on procedural grounds. The state court called the AG's conduct "outrageous" and ordered the attorney general's office to cease and desist from ever similarly proceeding.

Gagan filed suit against Ritz under 42 U.S.C. § 1983 claiming that her actions in countermanning the state judge's order to prepare his trial transcripts violated his right of access to the courts. The district court dismissed the suit relying on *Imbler v. Pachtman*, 424 US 409, 46 S.Ct. 984 (1976) and various circuit cases, which hold that prosecutors and attorney generals are absolutely immune from suit. The court of appeals for the tenth circuit affirmed the dismissal with regards to the Colorado attorney general but reversed and remanded with regards to AG Ritz.

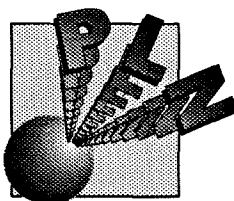
The appeals court noted that prosecutors are entitled to absolute immunity in § 1983 suits for activities "intimately associated with the judicial process" such as initiating and pursuing criminal prosecutions. All actions by a prosecutor are not subject to absolute immunity merely because they are performed by a prosecutor. Investigative and administrative actions taken by state prosecutors are protected by qualified immunity rather than absolute immunity.

To distinguish between prosecutorial and non-prosecutorial activities, i.e. absolute versus qualified immunity, courts have held that the determinative factor is "advocacy" because that is the prosecutor's main function. "The more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that absolute immunity will attach."

Applying those principles to the facts in this case the appeals court held that the AG's actions in countermanning a state judge's order directing a court reporter to prepare transcripts for use by a *pro se* litigant are not inherent to prosecutorial functions and thus are not entitled to absolute immunity. "We find it difficult to see how a prosecutor's actions in contravening the authority of the judicial branch of state government in regard to the defense of a civil action constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings, even under the most generous interpretation of that phrase, to which absolute immunity attaches."

"Stated alternatively, the actions at issue in this case are simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing criminal prosecutions to be covered by absolute immunity. We therefore conclude that the Assistant Attorney General has failed to carry her burden... of demonstrating her entitlement to absolute immunity, and accordingly, we reverse the district court's order of dismissal in this regard." The court did not address whether or not the AG would be entitled to qualified immunity for her actions.

In the district court Gagan had filed a motion to add the court reporter as a defendant in the suit. The lower court denied the motion holding that the reporter would be entitled to qualified immunity. The appeals court was troubled by this approach, noting that the reporter would have the burden of proving their entitlement to qualified immunity and that such a determination could not be made until they were a party to the suit. The appeals court granted the motion to amend the complaint and noted that if the court reporter does assert a qualified immunity defense the burden shifts to the plaintiff to show the rights violated were well established. The court cites several cases holding court reporters liable for excessive delays in preparing trial transcripts. The case was remanded to the lower court for further proceedings. See: *Gagan v. Norton*, 35 F.3d 1473 (10th Cir. 1994).■



No Liberty Interest in GA Parole Rules

In the April, 1994, issue of *PLN* we reported *Sultenfuss v. Snow*, 7 F.3d 1543 (11th Cir 1993). Stephen Sultenfuss is a Georgia state prisoner serving sentences for two drug convictions. Under the rules of the Georgia Board of Pardons and Parole (GBPP) he should have served 10 months in prison. Disregarding their own rules the GBPP imposed a period of 62 months of incarceration before parole.

Sultenfuss filed suit under § 1983 with several other Georgia prisoners alleging that the GBPP's actions, not following their own rules, violated the plaintiffs' rights to due process and equal protection of the law. The district court dismissed the suit as being frivolous under 28 U.S.C. § 1915(of). The court of appeals for the eleventh circuit reversed and remanded holding that Georgia parole board rules created a due process liberty interest. The court of appeals for the eleventh circuit granted a rehearing *en banc* and in its new 6 to 5 ruling reversed itself, holding that Georgia parole rules do not create a liberty interest. This case represents a major setback for Georgia state prisoners.

The appeals court gave an extensive discussion of state created liberty interests and cites extensive case law where state parole rules have been found to create a due process liberty interest. This is in the context that prisoners have no fundamental right to parole and parole boards have wide discretion, unless channeled by statute, to grant or deny parole.

The court gave an extensive explanation of the Georgia parole system and the rules used to calculate a prisoner's actual term of confinement. The court held that Georgia parole guidelines do not substantially limit the parole board's discretion as to whether or not they grant parole. "... we find that Georgia's parole system does not place limitations on the Board's discretion sufficient to create a liberty interest in parole." Likewise, the parole statutes and regulations do not mandate release if certain predicates are met. Quite the opposite, "the Georgia statutes actually create a presumption *against* parole." "Thus, while the legislature has required the Board to adopt a guideline system to be used as a framework for making more consistent parole decisions, it also preserved the Board's authority to use its

discretion in making final parole decisions. The statute and regulations, therefore, do not mandate that release be granted if the Guidelines criteria is met."

While the Georgia parole statutes are replete with mandatory language, the appeals court held that it did not create a due process liberty interest because no mandatory language expressly dictates the outcome of a parole hearing even if all the relevant criteria are met.

"Viewing Georgia's parole system in its entirety, we conclude that no protected liberty interest in parole is created. To give rise to a liberty interest in parole, the statutes and regulations must meaningfully limit the discretion of state officials. Here, the substantial discretion reserved by the Board belies any claim to a reasonable expectation of parole. Although the Board is required to follow some relatively strict procedures, the statutes and the Guidelines, acting in conjunction, do not mandate the grant of parole if specified criteria are satisfied. Instead, the system contains a statutory presumption against parole and an explicit reservation of authority to depart from the grid recommendation, negating any reasonable claim to parole." The court also relied on the parole board's statement that it did not intend its rules to create any type of liberty interest, in essence, a statement to the effect that they are not bound to follow the rules they have made.

While the majority opinion, which is binding, affirmed the lower court's dismissal of the suit five judges gave two dissenting opinions giving detailed reasons why they would have affirmed the previous appeal court ruling to the effect that Georgia's parole statutes and guidelines create a due process liberty interest enforceable in federal court. See: *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994) (*en banc*). [Readers should not cite the earlier ruling because it is no longer valid.]■

New Trial for Improper Voir Dire

California state prisoner Floyd Scott claimed that prison officials used excessive force in physically restraining him after he attacked a guard. The case went to trial and the jury returned a verdict in favor of the defendant prison officials. Scott appealed claiming

that the trial court had committed reversible error when it told the jury panel members, during *voir dire*, about his prior convictions for sexual battery and rape. The court of appeals for the ninth circuit held that this disclosure was a prejudicial error and reversed and remanded the case for a new trial.

Prior to the trial, defense counsel informed the court that it planned to introduce evidence about Scott's criminal history in order to impeach his testimony because in a deposition Scott allegedly denied having the two prior convictions. Neither party sought special instructions to the jury concerning the prior convictions or the nature of the offenses leading to the convictions. In questioning jury panel members, the court asked one juror whether the fact that Scott had been convicted of rape and sexual battery would affect the manner in which he viewed Scott's testimony. The juror said no.

However after the trial actually commenced, Scott's criminal history was never introduced into evidence in any other form. The appellate court noted that *voir dire* exists to probe prospective jurors' state of mind so that counsel and the trial judge can assess suspected bias or prejudice. Trial judges have a serious duty to determine questions of actual bias in jurors.

In this case the appeals court held that Scott was prejudiced by the court's *sua sponte* revelations about his criminal past. "...we hardly need state that rape and sexual assault convictions are among the most prejudicial types of information the jury could learn about the plaintiff in a civil suit. Second, despite the prejudice inherent in such convictions the trial court informed the jury of them without being required to do so. Specifically, the convictions could have been admitted at trial solely for purposes of impeachment, and even then only if the court found that their probative value outweighed the prejudice. . . . While the balancing test of Rule 609 might have permitted the court to admit the bare fact of appellant's convictions, the additional step of informing the jury of the specific charges involved was clearly more prejudicial than probative. Thus, the court told the jury more than necessary, thereby prejudicing appellant."

The court noted that under California state law, *People v. Valentine*, 720 P.2d 913 (1986), when criminal defendants stipulate to the existence of prior felony

convictions where it is a required element of the charged crime, the nature of the prior felony should not be disclosed to the jury. The court held the error was further compounded by the fact that the lower court made the disclosure not knowing whether the prior convictions would actually be introduced in the case, and they never were. The court held that the introduction of the prior convictions tainted the proceedings and denied Scott the right to a fair trial. See: *Scott v. Lawrence*, 36 F.3d 871 (9th Cir 1994).■

MI DOC Has Duty to Give Women Prisoners Legal Aid

Past issues of *PLN* have detailed the long running saga by Michigan state prisoners to ensure their right of access to the courts [See: *PLN*, Nov. 1994] whereby the DOC must provide them with either law library access or the assistance of counsel. The latest installment is that the MDOC decided to halt funding for Prison Legal Services of Michigan (PLSM) to provide women prisoners with assistance in 42 U.S.C. § 1983 suits challenging prison conditions.

The DOC took this position concluding that previous court rulings, *Knop v. Johnson*, 977 F.2d 996 (6th Cir.1992) did not apply to female prisoners in Michigan and thus did not obligate them to provide women prisoners with access to the courts. The district court was apparently disturbed by this novel interpretation of law and issued an order designed to clarify the MDOC's obligation towards its female prisoners.

"Defendant's argument is based entirely on the presumption that the right to § 1983 legal assistance was established in *Knop* and *Hadix*. Thus if *Knop* and *Hadix* do not apply to the scope of legal assistance provided to female inmates, the plaintiff class does not have a right to §1983 legal assistance. The error in defendant's argument is that the right to legal assistance in §1983 does not begin with *Knop* and *Hadix*. The U. S. Supreme Court established this right in *Wolff v. McDonnell*, 418 US 539, 94 S.Ct 2963 (1974). In *Wolff*, the Supreme Court affirmed the decision of the court of appeals extending the state's duty to provide legal access to include not only habeas corpus

Women Prisoners (cont.)

actions, but constitutional and civil rights matters as well..."

"The state does have an obligation to provide legal assistance, through PLSM or some other provider, in cases involving constitutional rights and other civil rights actions related to an inmate's incarceration." See: *Glover v. Johnson*, 862 F.Supp.180 (ED MI 1994).■

Medical Indifference Suit Requires New trial

William Hathaway is a New York state prisoner. In 1973 he underwent hip fusion surgery and had three metal pins inserted into his left hip joint. He continued to experience pain after the surgery and in 1977 sought medical assistance from Dr. Schlesinger, the prison doctor. Schlesinger found one of Hathaway's feet was shorter than the other and prescribed orthopedic shoes. Joseph Foote, general practitioner, consulted with Schlesinger about the condition and they referred Hathaway to Dr. Quellman, an orthopedic specialist.

Quellman diagnosed a degenerative disease in the left hip joint and prescribed pain killers and orthopedic shoes. In 1980 Hathaway repeatedly sought treatment for chronic pain in his hip. In July, 1980, Foote and Quellman took X-rays which showed that two of the three pins in Hathaway's hip had broken. They did not tell Hathaway of the broken pins nor discuss treatment options. Hathaway learned they were broken in July, 1981, when a nurse told him. After learning of his condition Hathaway told Foote he would consent to surgery but this was not presented a treatment option.

The hip pain persisted and went untreated. A Prisoners' Legal Services attorney wrote to prison officials seeking treatment for Hathaway in 1982 and that was ignored. In October, 1982, Hathaway filed suit under 42 U.S.C. § 1983 claiming that the repeated delays in giving him appropriate medical care for his hip constituted deliberate indifference to his right to medical care. In October, 1983, Quellman performed the necessary surgery on Hathaway, removing the broken pins and performing a bone graft. The district court initially dismissed the case holding

that Hathaway had failed to state a claim of deliberate indifference to his serious medical needs. The court of appeals reversed because a two year delay in arranging hip surgery could constitute deliberate indifference. See: *Hathaway v. Coughlin*, 841 F.2d 48 (2nd Cir. 1988).

On remand counsel was appointed and the case went to trial. At the close of evidence the trial court dismissed all the defendants except for Foote, for lack of personal involvement. The jury deadlocked with regards to Foote whereupon the court declared a mistrial. Foote then moved for dismissal pursuant to Fed.R.Civ.P. 50(b). The court denied the motion and Foote appealed. The appeals court for the second circuit denied his appeal, affirmed the lower court and remanded the case for a new trial on the merits.

In his appeal Foote claimed that Hathaway had failed to show sufficient evidence of a departure from accepted medical practices and failed to show proof of the requisite mental state of culpability associated with medical indifference. The appeals court gave an overview of the legal standards in prisoner's medical indifference claims. To prevail the plaintiff must allege a deprivation that is, objectively, "sufficiently serious" and that the defendant official acted with a sufficiently culpable state of mind. "Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm... More specifically, a prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards' an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

The court held that Hathaway had shown sufficient evidence at trial to support a jury's finding that he had a serious medical problem. Likewise, the court held that Hathaway had shown sufficient evidence to support a finding of deliberate indifference. The court placed great reliance on the fact that Foote never told Hathaway that the hip pins were broken. A jury could also infer deliberate indifference from the fact that Hathaway was not referred for surgery until more than two years after Foote discovered the broken pins. The referral took place only after Hathaway had filed suit on the matter.

Foote claimed he could not have shown deliberate indifference to Hathaway's medical needs because he was a general practitioner and he referred Hathaway to a specialist and reasonably relied on Schlesinger and Quellman to provide any necessary medical care. "We disagree. This is not a case where a general practitioner merely referred a patient to a specialist and had limited subsequent contact with that patient. To the contrary, Foote personally saw and treated Hathaway on the majority of the numerous occasions on which Hathaway complained about pain. As such, Foote was the official most familiar with Hathaway's condition, even as a general practitioner. We decline to adopt a rule that in effect would exempt general practitioners from being found deliberately indifferent to a patient's serious medical needs as long as that general practitioner at some point refers the patient to a specialist, regardless of the extent of contact that general practitioner has with the patient."

The fact that Foote saw Hathaway on numerous occasions did not vindicate him because the course of treatment clearly did not alleviate his suffering. In a two year period Hathaway sought medical treatment and complained of pain on nearly fifty occasions. "A jury could infer deliberate indifference from the fact that Foote knew the extent of Hathaway's pain, knew that the course of treatment was largely ineffective and declined to do anything more to attempt to improve Hathaway's situation."

Foote argued the action should be dismissed because no expert evidence was presented that his conduct had not fallen below any professional norms and did not constitute medical malpractice. "Foote's argument is unpersuasive. We have never required plaintiffs alleging a denial of adequate medical care in a § 1983 action to produce expert medical testimony. The inquiry remains whether the treating physician or other prison official was deliberately indifferent to a prisoner's serious medical needs, not whether the doctor's conduct is actionable under state malpractice law. Expert testimony certainly could have bolstered Hathaway's case at trial, but the absence of such expert proof does not mandate dismissal of his action where the facts support a finding of deliberate indifference."

The court also held that Foote was not entitled to qualified immunity because "it would not be objectively reasonable for him to believe his conduct did not violate

Hathaway's rights." The case was remanded for a new trial on the merits. See: *Hathaway v. Coughlin*, 37 F.3d 63 (2nd Cir. 1994).■

TX Parole Bd. Can't Use Voided Priors

John Cook is a Texas state prisoner. In 1964 he was convicted of burglary. In 1982 he was convicted of indecency with a child and received a 20 year sentence which included a ten year enhancement for the 1964 conviction. In 1987 the court of appeals for the fifth circuit voided the 1964 conviction and reversed the 1982 conviction. Cook entered no contest plea on the indecency charge in exchange for a time served sentence.

In 1993 Cook was convicted of possessing a controlled substance and sentenced to five years in prison. That same year Cook was deemed ineligible for parole because of a criminal behavior pattern, involvement with a controlled substance, multiple offender status and a parole violation on a previous sentence. Cook admits that the controlled substance factor is a valid parole issue but that the parole board had violated his constitutional rights by considering the other three factors which had been voided by the appeals court. Cook filed suit against the parole board under 42 U.S.C. § 1983 seeking an injunction prohibiting the board from considering the voided issues in determining his parole eligibility.

The district court dismissed the suit holding that Cook had to pursue the action as a habeas corpus action, which required the exhaustion of state court remedies first. The court of appeals for the fifth circuit held the action was properly brought as a § 1983 action and reversed.

"§ 1983 is an appropriate legal vehicle to attack unconstitutional parole procedures or conditions of confinement... when a prisoner challenges the result of a single defective parole hearing that claim must be pursued by a writ of habeas corpus.... Board based challenges to the parole board's rules and procedures that affect a prisoner's release must also be pursued in habeas corpus, if resolution of the factual and legal allegations would automatically entitle the plaintiff to accelerated release... In considering whether a broad based claim has such an effect, a distinction must be made between claims

that would *merely enhance* eligibility for accelerated release and those that would *create entitlement* to such relief... A claim that has an *indirect* impact on the determination of whether a claimant eventually receives parole may still be cognizable under § 1983."

The appeals court held that Cook had properly sought § 1983 relief because he was seeking injunctive relief rather than challenging the results of the parole hearing. "We follow our sister circuits in holding that a prisoner's challenge to parole board consideration of voided prior convictions is cognizable under § 1983, when the prisoner does not challenge the result of the hearing or request a new hearing at a specified time."

The court reversed the dismissal of the suit and remanded it with instructions for the lower court to "order entry of injunctive relief prohibiting the Board, in future parole proceedings, from considering Cook's two prior convictions held void in *Cook v. Lynaugh*, 821 F.2d 1072 (5th Cir.1987)." The lower court was also ordered to consider claims against the Midland County sheriff for denying him access to the courts. See: *Cook v. Texas Dept. of Criminal Justice Transitional Planning Dep't.* 37 F.3d 166 (5th Cir. 1994).■

MI DOC Visitor Ban Overturned

Randy Kelley is a Michigan state prisoner who was infracted and found guilty by a prison disciplinary board of sexual misconduct, namely, cupping his hands over his wife's breasts during a visit. As a result, both he and his wife were given a permanent visitor restriction. Keller is serving a 30 to 60 year sentence.

Keller filed suit in Ingham County Circuit Court challenging the permanent visitor ban as being unlawful and contrary to Michigan Department of Corrections (MDOC) policy. The court agreed and overturned the ban. Keller did not challenge the results of the disciplinary hearing.

The MDOC at first argued that Kelley lacked standing to challenge the visitation restriction because it was imposed on his wife. The court rejected this argument finding that MCL 791.251 and MSA 28.2320(51) intend that visitation be a prisoner's right "which the prisoner himself must be permitted to vindicate at an

administrative hearing where the Department proposes to restrict that right."

Proceeding to the merits of the claim the court held that the visitation ban was unlawful for several reasons. First, Kelley was not allowed to be present and participate in the hearing which denied him his visiting rights. The issue of visitor restriction were not posed or addressed at the disciplinary hearing. The MDOC denied the administrative appeal by claiming that Kelley could have contested it at the disciplinary hearing and his wife could have, but chose not to, attend. The court held this reasoning was erroneous as a matter of law. "... this permanent visitor restriction was made upon unlawful procedure resulting in material prejudice to Petitioner. On that ground alone Respondent's decision must be reversed."

The court also reversed the ban finding that the sanction was not adequately supported by evidence in the record. The court held that MDOC Policy Directive PD-BCF-63.02, on prisoner visiting, and which mandated the sanction of a permanent ban on visiting if a prisoner was found guilty of sexual misconduct with a visitor was unlawful because it clashed with Rule 609, 1979 AC, R 791.6609 and Rule 611, 1979 AC, R 791.6611 which not only did not authorize that sanction, but "...neither provided any sanction for the sexual misconduct that is the subject of Kelley's petition." The above rules only authorize a sanction if the visit constitutes a "clear and present danger to the order and security of the institution" and its purpose is to commit an illegal act. The court held: "Consensual fondling of a spouse's breasts is not an illegal act, and the hearing officer made no finding that such conduct presented a clear and present danger to institutional order and security. The policy directive mandating a permanent visitor restriction for that misconduct sanctioned behavior without regard to the foregoing standards and thus was not authorized by law."

The court also held that the MDOC's sanction was arbitrary and capricious because PD-BCF-63.02 mandated a permanent visitation ban for all cases of sexual misconduct including the prisoner or the visitor touching or attempting to touch or expose breasts, buttocks or genitals as well as "ultimate sex acts." The court found that this contradicts the policy's statement which states that visitation between prisoners and their family members, to include their spouse, friends and

potential employers are important for rehabilitation and post-release adjustment. "... under PD-BCF-63.02, undifferentiated sexual misconducts of whatever kind, degree or frequency compelled nearly automatic deprivation of the prisoner's right of visitation on a 'permanent' basis. That contradicts the Department's interest in fostering rehabilitation and post-release adjustment to reintegration into society." The policy also ignores prevailing concepts of progressive discipline, where the gradation and frequency of offenses warrants increasing the punishment for the offense. "Thus, PD-BCF-63.02 mandated imposition of the most severe visitation sanction for 'ultimate' sexual acts, for petting and partial nudity as well as the single and comparatively innocuous act of fondling, as in this matter. Infliction of such an inflexible penalty on spouses is—there is no better word for it—ludicrous."

The court held that the MDOC had abused its discretion and behaved unlawfully by imposing the same sanction for assault, smuggling and assisted escape as for fondling. "The requirement of a permanent visitor restriction for a single incidence of sexual misconduct reflects gross insensitivity to the severity of sanction relative to the significance of the offense. Chaste conduct between prisoner and visitor may be important to institutional integrity, but brief episodes of consensual fondling, especially spouses, are not tantamount to grievous offenses against that value, such as are assault, smuggling and assisted escape... This kind of sexual misconduct hardly belongs in the same category as those offenses. To lump them all together as the DOC has done in the policy directive is patently unreasonable."

"Finally, the agency's decision here and the policy directive that required it are arbitrary and capricious because neither takes into account the particular circumstances of the offending conduct." The court reversed the permanent visitor ban in the case in its order signed November 23, 1994, by circuit judge James Giddings. The case is unpublished and cannot be cited as controlling precedent but is helpful for Michigan state prisoners litigating this issue. See: *Kelley v. Michigan Department of Corrections*, Case No. 93-74817-AA. ■

Settlement Reached in MT Prison Case

A settlement agreement has been reached between attorneys for prisoners at the Montana State Prison (MSP) and Montana state officials responsible for running the prison. The case, *Langford v. Racicot*, was originally filed on December 30, 1993. The National Prison Project of the American Civil Liberties Union Foundation in Washington, D.C. and local counsel Edmund Sheehy and Scott Wurster brought the case before U.S. Magistrate Leif Erikson in the Federal District of Montana in the aftermath of the 1991 riot and loss of life.

The settlement, approved by the court on November 29, 1994, was reached after a year-long pretrial investigation revealed serious problems in medical, dental and mental health services at the prison, among other things. If defendants fail to abide by the agreement, reached after many months of negotiations, or if conditions deteriorate during the life of the agreement, attorneys for the prisoners retain the right to seek further relief from the court at any time. This is critically important, especially in the event of future overcrowding or lack of resources.

Some of the key provisions of the settlement are as follows:

Medical

- increased physician and nursing coverage to meet the needs of the MSP population;
- hiring of a medical director to develop a comprehensive medical care system;
- tuberculosis screening and followup, following the Centers for Disease Control's guidelines;
- elimination of dental list backlog within one year;
- dental care within 60 days and sooner if indicated;
- retention of a part-time psychiatrist to develop a comprehensive mental health services plan

Housing

- prisoners will be allowed eight hours out-of-cell time;
- defendants will fully comply with State Building and Fire codes;

Classification

- cooperation between the parole board and prison officials to develop realistic parole plans;

- annual review of prisoners' treatment plans;
- implementation of objective-based classification system;
- security implementation of National Institute of Corrections' recommendations made after the 1991 riot at Maximum Security. This is to ensure that conditions leading to the riot do not recur;
- adequate security staff and training for staff;

Maximum Security

- increased amount of structured out-of-cell time for prisoners who adhere to prison rules; weekly rounds of mental health staff;
- daily sick call in an exam room on-site;
- make available cell study and anger management programs.
- Handicapped prisoner compliance with all provisions of the Americans with Disabilities Act.

National Prison Project attorney Mark Lopez says of the agreement, "The agreement is a good first step to ensure that the conditions and practices which preceded the 1991 riot at MSP do not recur. Unless, however, Montana's elected officials take responsibility for stemming the flow of prisoners into MSP through diversion programs and responsible sentencing laws, Montanans can be certain that the progress made since the riot will be undone." ■

BOP Good Time Ploy Exposed

Over the years *PLN* has repeatedly gotten inquiries from readers in the Federal Bureau of Prisons (BOP) inquiring about rumors that the amount of statutory good time they were eligible to earn under the new sentencing guidelines would be increased from 56 days a year to relieve prison crowding. Our response has been that given the political climate it will be surprising if good time remains at all, much less that it'll be increased. As an example, the 1994 crime bill reduced good time awards to 54 days a year for "violent offenders." The sheer number of inquiries should have made us suspicious, but we attributed it to wishful thinking on the part of BOP prisoners.

PLN has received a signed copy of a memo marked "restricted communication" dated December 8, 1992, and signed

by Philip Spears, warden. While the prison is not specified the American Corrections Association states that Mr. Spears was warden of the Federal Prison Camp in Big Spring, Texas, in the early 90's. The memo, addressed to all department heads on the subject of "EGT Dispensation Program" states:

"Thanks to all department heads for their participation in the EGT [Earned Good Time] Dispensation Program. I would like to encourage those departments not currently participating in the program to do so. This program is considered vital to the management of inmates throughout the Bureau of Prisons. Its simplicity and effectiveness has proven itself since its inception three (3) years ago."

"To reiterate my July 14, 1992, memorandum, the basic tenet of this program is as follows: 'Each department head will designate one staff member to leak information regarding upcoming extra good time awards to selected inmates. These awards being based upon good conduct, and participation in Bureau approved programs.'"

"Any questions regarding the EGT Dispensation program should be directed to Dr. Nancy Holmes (Program Coordinator), Psychology Department, Ext. 412."

It appears that the BOP realized that prisoners doing flat sentences of 30 and 40 years weren't going to be inclined to be obedient if they could only get 56 days a year off their sentence. To cover up the fact that they had very little carrot they embarked on this program whereby the BOP dispenses rumors that more good time, i.e. shorter sentences, are just around the corner. All prisoners will have to do to get it is do whatever the BOP says and not rebel, it being understood that the BOP would do the awarding of the good time. An analogy is the donkey who has the carrot tied to its back dangling in front of him, no matter how far he walks it'll never get the carrot.

In the real world only Congress can increase or change the amount of good time awarded to BOP prisoners. Given today's political climate, as exemplified by the recently passed crime bill, with the Gingrich controlled congress, does anyone think there is a likelihood laws will be passed to let federal prisoners out sooner? That's unlikely, so stop dreaming about that carrot. Anyone wanting a copy of warden Spears' memo should send *PLN* a SASE requesting it. ■

BOP Guard Killed

A report in the *Atlanta Journal Constitution* states that the US penitentiary in Atlanta is the most dangerous federal prison in the country with five prisoners killed in a year. During a May, 1994, tour by BOP director Kathleen Hawk, one prisoner stabbed and killed another. Prison guards have complained that they are in danger of being assaulted because the assault rate at Atlanta is 33 per 1,000 prisoners, three times the national BOP average. Of course, this doesn't take into account that a prison's definition of "assault" includes throwing a tray, spitting, etc. Warden Fred Stock dismisses guards complaints as whining. "Everyone knew what they were getting into when they signed up..."

On December 22, 1994, several weeks after the above article appeared, D'Antonio Washington, a BOP guard at Atlanta Penitentiary died from head injuries he received from a prisoner. The BOP stated he was the first guard killed at Atlanta in 15 years and the first in the BOP since 1987. The FBI stated that it already had a suspect but did not identify him until such time as he was indicted by a grand jury. No reason was given for Washington's killing.

Kevin Blaylock, a spokesman for the American Federation of Government Employees, the guards' union, blamed the incident on inadequate staffing and dangerous conditions. He stated that prison management had not done enough to prevent weapons from falling into prisoners' hands. Here at *PLN* we contrasted this response, that prison officials were responsible for not taking steps to prevent Washington's death, etc. with the response surrounding the murder of Jeffrey Dahmer at a Wisconsin prison.

On November 28, 1994, Dahmer was clubbed to death with a broomstick by another prisoner. Dahmer was serving 15 life sentences for the killing, cannibalism and necrophilia of 17 young men and boys. Michael Sullivan, the director of the Wisconsin DOC told media: "The taxpayers can't afford 100 percent safety in the prisons. There is an understanding in prisons that staffs far outnumbered by inmates and that means that we cannot guarantee anyone's absolute safety 24 hours a day, seven days a week." ■



FBI Investigates CDC Shootings

In the January, 1995, issue of *PLN* we ran an article about the shooting death of a San Quentin prisoner by California Department of Corrections (CDC) guards. In the past ten years CDC guards have shot and killed 36 prisoners, including three since September, 1994. That is three times more than all other U.S. prison systems combined.

In October, 1994, the FBI announced that it was investigating possible civil rights violations at the Corcoran State Prison near Fresno where seven prisoners have been shot to death by guards since the prison opened in 1988. The FBI has notified the CDC of the investigation and asked them not to interfere. A CDC spokesman has stated that a federal grand jury may be convened to investigate as well. Guards and other prison employees have been interrogated by the FBI, apparently focusing on the prison's shooting policy. Prisoners were interviewed as well.

Corcoran has the highest number of shooting deaths of any CDC facility, followed by Pelican Bay where four prisoners have been gunned down by CDC guards since it opened in 1989. The Kings County district attorney has reviewed each of the shooting deaths at Corcoran and stated that none of the deaths seemed improper. District attorney Patrick Hart stated that the only Corcoran death "that might raise questions" is "In 1992, officers trying to stop a knife attack accidentally shot and killed the inmate who was the victim of the attack."

Staff misconduct at Corcoran is not unknown. In December, 1993, a guard was fired for using marijuana and cocaine while off duty. In 1990, two lieutenants were convicted of criminal assault in state court for using a Taser (a device which fires up to 50,000 volts of electricity via two darts) on a prisoner's testicles. ■

Source: *Los Angeles Times*, 10/27/94.

WA Special Commitment Center Failing

In 1989 Washington State passed a controversial "civil commitment" law to allow for the indefinite incarceration of "dangerous sexual predators." Opponents of this law point out that although

those who are determined to be sexual predators are confined to a "treatment center" until they can show that they are no longer dangerous, the law's true purpose is indefinite imprisonment of those who fall under its scope. Challenges to the civil commitment law itself have withstood state court scrutiny and litigation is pending in federal district court.

One of the prisoners confined in the "Special Commitment Center", Richard Tutay, filed suit in a separate action claiming that although he was confined there until he can demonstrate that he has received a sufficient amount of treatment, conditions in the center preclude him from getting quality treatment. His suit alleged that his confinement amounted to imprisonment and that he was treated more like a prisoner than as a person with a mental illness.

In response to that suit, U.S. District Court Judge William Dwyer issued an injunction calling for a variety of improvements in the way the center is run. He ordered the appointment of a special master to evaluate the treatment center and oversee court ordered improvements to the center.

In a related action in King County Superior Court, Judge Sharon Armstrong cited a long list of deficiencies in the center. Among the problems cited in her 16 page ruling were: unqualified and inadequately trained staff; lack of critically needed treatment components; frequent staff abuse of those imprisoned (the court refers to them as "residents") in the center, in one case a staff member tried to talk one prisoner into assaulting another prisoner; those imprisoned in the center have less freedom of movement and fewer treatment alternatives than sex offenders imprisoned by the Department of Corrections (the Special Commitment Center, although attached to a wing of a DOC prison, is operated by the Department of Social and Health Services); little actual therapy is offered, and the relations between center staff and those under their charge is so poor that few of the prisoners participate in the "treatment" at all.

Janice Marques, a California expert in the treatment of sex-offenders, is the special master anointed by Dwyer. She filed her first report in December of 1994 after a two day visit to the center. She cited lack of staff teaming; critical treatment components not offered (such as family ther-

apy and after care), and a "lack of specific behaviors the residents must learn, to avoid repeat crimes." She also cited the program for not having a strong clinical leader or a well-articulated statement of how the program works.

Considering that those imprisoned at the center have been found to suffer from a "mental disorder" that predisposes them to commit sex crimes, and are indefinitely committed until they can show that they have been "treated" for this mental disorder, the landings of the special master, casts serious doubt on the state's assertion that the law is not "preventative detention" as most critics claim. ■

WA Prisoners Under Attack

By Paul Wright

Someone once said that no citizen's life, limb or property was safe while the legislature was in session. Substitute "Prisoner" for "citizen" and you have an idea of what things are like in Washington. Fortunately, the Washington state legislature is only in session for periods of 60 to 105 days a year. The 1995 legislative session began on January 9 and ends on April 15, until then it's a countdown of prisoners being held hostage by the most vicious and reactionary elements in state politics. *[Due to the shortness of the legislative session and PLN's press deadlines we can't provide up to the minute coverage of legislation. Once the session is over we will report on what was actually passed into law. If immediate action is required on a specific bill we will send our Washington readers a special mailing to that effect.]*

A whole slew of repressive anti-prisoner legislation was profiled before the legislature's session even began. A lot of the bills were introduced by Spokane Republican Mike Padden. Padden heads the Law and Justice committee in the state house. Judging him from his television appearances he is about as bright as a 15 watt light bulb, but the anti-prisoner movement is not based on intellect or reason. Rather than focus on societal problems the fascist right wing is targeting the weakest segments of society, single mothers, immigrants and prisoners, as scapegoats for the failures of capitalism. It is also worth noting that people like Padden are right-wing social activists

who are not only out to bash prisoners but also oppose gay rights, women's right to control their bodies (i.e. abortion), the separation of church and state, etc.

Since 1981 Washington has had an Extended Family Visiting (EFV) program in which prisoners can visit with immediate family members (spouses, parents, grandparents and children) in a private setting. The visits take place on prison grounds and last between 21 and 46 hours, depending on the prison. The visits are received between 30 and 90 days apart, again depending on the prison. In order to be able to participate in the program prisoners must have no drug related infractions, no assaults on staff, hostage taking, rioting, etc. for specified periods of time.

Prison activists struggled for this program for many years in the 1970's as a means by which prisons could build and retain their family ties, especially with their spouses and children. The program was actually instituted as a result of recommendations by Anthony Travasino, then head of the American Corrections Association, who was investigating why Washington prisons had experienced over a decade of riot, struggle, murder, brutality and turmoil. Travasino recommended that the EFV program be instituted, essentially as a bribe, to reduce violence and unrest within the prison system. This followed the same pattern behind which family visiting programs were instituted in other states (i.e. New York after Attica, California after the struggles of the 1960's, New Mexico after the Santa Fe riot, etc.) and underscores the fact that prison officials could care less about prisoners' rehabilitation and family ties; all they want is smooth running prisons.

Mr. Padden however could care less about smooth running prisons or prisoners' family ties. To that end he introduced House Bill (B) 1054 which would eliminate the EFV program, ban televisions and so called "erotic" and "violent" literature. The purported intent of the bill is to target waste and inefficiencies while maintaining clear and effective punishment and rehabilitation goals. The legislature further finds that the programs, amenities, and activities available to inmates in our state correctional institutions should reflect the strong moral values and ideals that contribute to the betterment of society and promote "good citizenship." Of course, it is quite ironic that Padden, who purports to support "family values"

is doing all he can to destroy those families who have a member imprisoned.

As initially introduced by Padden the bill would completely and totally eliminate the EFV program, closed circuit televisions within the DOC and censor anything deemed "obscene" and "violent" by the legislature. The latter portion had obvious first amendment problems. The bill originally stated that all money "saved" would be placed into a fund for crime victims, prison industries expansion and similar prison expenses. The funds could not be placed into the general fund. This language was deleted when the bill cleared the committee, after it became clear there were no "savings" because no tax money was involved to begin with.

On January 7, 1995, Todd Hiivala, a prisoner at the Clallam Bay Corrections Center stabbed his wife with a kitchen knife during an EFV on prison grounds. After his wife Heather ran screaming out of the trailer a guard ordered Hiivala to drop the knife and fired several warning shots. When he tried to stab her again the guard shot and wounded him in the shoulder. Both were taken to a hospital for treatment and Hiivala's arm was subsequently amputated. Hiivala's timing is extraordinary. This was the first incident of its type in the 14 year history of the Washington EFV program and it occurred two days before the Republican dominated legislature was due to start with legislation eliminating the program being high on the list. Within the week Governor Mike Lowry had ordered a suspension of the EFV program at CBCC pending an internal investigation of the incident and he ordered the DOC to conduct a statewide evaluation of the program.

The bill was premised and read on the legislature's opening day of January 9, 1995. Public hearings on HB 1054 were held on January 15, 1994, in the house corrections committee in Olympia. Padden was the first person to testify. He said it was time to make prisons places of punishment. Padden said he wouldn't object to modifying the bill to eliminate weights as well. During his speech he repeatedly said "If this bill generates any new revenue." When he was asked by committee members what the specific "savings" from the bill would be he was not sure about what or if any revenue would be saved. Meanness and vindictiveness are the driving force behind this type of law. Nothing is paid for by the state or taxpayers. All costs associated

with the EFV and TVs are paid for with funds from the Inmate Welfare Fund. After testifying Padden left the hearing room, showing his contempt for what anyone else might have to say.

The next people to testify were several DOC employees. Tom Rolfs, the director of prisons, testified that the EFV program and TVs were "tools" the DOC set in place 15 years ago which has brought a form of peace to the prison system. He noted that the state prison system is operating at 142% of its rated capacity. The EFV program offers a valuable incentive for prisoners to stay out of trouble and obey prison rules. Television offers prisoners distraction and entertainment, according to Rolfs. Tana Wood, warden of the Washington State Penitentiary at Walla Walla, testified that eliminating the EFV program would take the DOC backwards to the violence of 15 years ago. She stated that the cable TV system is used and required by the DOC for communicating with prisoners, making announcements, etc. Both were "vital tools" to be used in the smooth running of the prison system. She also said weights were a "tool" for reducing stress levels. On the issue of "punishing" prisoners, she asked the members of the corrections committee if they had an idea of what it was like to "have every ounce of privacy taken from you, right down to their natural body functions, not to mention the strips and pat downs they endure daily?" No committee member replied or commented.

Kurt Peterson, warden of the Washington Corrections Center at Shelton concurred with Rolfs' and Wood's testimony and went into more detail about DOC overcrowding. He responded to Padden's comments about the Clallam Bay incident by stating that there had been very few negative incidents related to the EFV program. He stated that some 300 EFVs have taken place each month for the past 14 years with only this one major incident, he said "your math is as good as mine, you figure that one." It is noteworthy that none expressed any concern about prisoners' family relationships or rehabilitation.

A number of private citizens spoke against the bill. Cheyenne Lincoln Armstrong is a volunteer at WSR, she is also a surviving family member of a murder victim. She expressed her support for the various programs and concluded that "There is no hope in hatred and no peace in vengeance."

Bill Haynes testified about his EFVs with his son and how he had taken his grandchildren to visit their father each year because they lived out of state. He testified "...and if you think that wasn't a very special time for me or them you're dead wrong, and let me assure you there was nothing conjugal about those visits." He also expressed his resentment to Padden's comparing incarceration with military leave. Stating he was retired military, with 25 years of active duty service, he noted he always had a choice in the military to come home to a conjugal visit. On the cable TV issue, Bill stated he is a degreed electronics person and that without cable there would be no TV reception in prisons.

Donna Parsons, a prisoner's wife, began by looking around the room and asking "Is representative Padden here? I have something to say to him." Followed by "I didn't think so." She testified that "Representative Padden says prisons are for punishment, but did anybody ever ask him who is being punished if extended family visits are stopped? I would be punished and my child would be punished if we couldn't be there as a support system for my husband." Julia Holder testified about the difficulty in maintaining a family when a spouse is imprisoned. Her daughter also testified about the importance of family visits with her father.

A prosecutor who had formerly backed the ban on EFVs and TVs also testified, this time stating that he was withdrawing his previous support. Recognizing that the DOC should be free to manage its facilities as it sees fit and that after hearing from the DOC he thought the programs were beneficial to prisoners and the state.

The only person who testified in favor of the bill was Lew Cox, a former volunteer Catholic minister at the Penitentiary. He claimed that EFVs don't help families. He said that many prisoners con women into marrying them and dump them after release.

The portion dealing with erotic and violent materials did not receive much attention at the hearing. In the event the bill is passed this provision can be challenged as being unconstitutional because it violates the first amendment.

As a result of the above testimony the "corrections committee" extensively rewrote the bill, and included a ban on weight lifting as well. The rewritten bill was introduced on February 17, 1995, and passed on to the House floor to be voted on. As we go to press the bill has not been

WA Prisoners (cont.)

voted on. The overall effect of the rewritten bill is keep the EFV program, weights, and TV's but in such a form that, in reality, the programs will be eliminated in everything but name. This is summarized by the bill's title "Reduction of Offender Privileges."

With regards to the EFV program, the bill would codify current DOC policy which limits outside family members who can participate to immediate family. But, in a feature which will exclude a large percentage of married couples, only those couples who were legally married at the time of the prisoner's conviction can participate. The bill states that the DOC can implement a program "for the sole purpose of maintaining and promoting functional and cohesive family relationships," and then goes on to ensure that exactly the opposite occurs.

The bill states that EFVs will occur no more than every sixty days and last no longer than 24 hours. It limits prisoner participation to only those who are employed in correctional industries or education program "no less than eight hours per day and no less than forty hours per week." The problem with this is that there are no eight hour a day jobs in the DOC nor enough jobs and education to go around even if prisoners did want them. "The department shall be required to provide work and education programs consistent with this act to the extent that no additional funds are appropriated." Only prisoners without any major infractions in the past year can participate. It also excludes prisoners in "maximum custody" and numerous sub categories from participating.

Prisoners allowed to participate in this gutted remnant of an EFV program "shall be subject to no less than ten random urine analysis tests for drugs any time for a period of six months after the family visit. If an inmate tests positive for drugs he or she shall not be eligible for a family visit for the remainder of his or her sentence."

The long-standing benefits of the EFV program for prisoners and their families are obvious. One study done in Texas, showed that prisoners who received visits were less likely to return to prison. It is obvious that the family remains prisoners' strongest source of support which is likely to prevent them from committing new crimes after release from prison. In

most cases, family support is the only form of support or network prisoners have upon release. Washington state prisoners get \$40 and a one way bus ticket to their place of arrest upon release. Prisoners and their supporters need to do everything possible to prevent passage of this law. It is obvious that Padden and the rest of the Republican right won't be content until the EFV program is totally eliminated. If they take a little bit now you can bet they will be back for the rest of it next year.

The bill would eliminate all closed circuit television (which due to the layout of Washington prisons would effectively prevent all television reception) in new or expanded prisons unless the DOC came up with a plan to show how the television systems would be used for training and vocational purposes. Prisoners would not be "eligible for individual television privileges unless he or she is working in a correctional industries job or successfully enrolled in a department education program."

The only weight lifting and weight training allowed in prison would be for prisoners "who volunteer to participate and are approved by the department to participate in official nationally sanctioned or official state sanctioned weight lifting team competitions. Each prison may establish no more than three inmate weight lifting teams. Each inmate weight lifting team is limited to no more than thirty five inmates." Again, only prisoners working in industries or education can take part. The bill states "the department shall only provide recreational options that minimize the inmates' ability to substantially increase muscle mass. Dietary supplements made for the sole purpose of increasing muscle mass shall be only available for purchase to members of the inmate weight lifting teams." The politics behind banning weights in prison is explored in my companion article in this issue of *PLN*.

The bill would ban any type of written, pictorial or television material deemed to be "obscene," "sexually explicit," "violent," etc. In other words, the stuff that Republicans have been trying to censor everyone else from seeing for years. The difference is they think they can get away with it on prisoners.

The biggest and sickest joke of all with HB 1054 is that it is labeled "Emergency" legislation! "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public

institutions, and shall take effect immediately." I have been reading Washington state legislation for about the past eight years and this is the first time I have ever seen "emergency" legislation. The only "emergency" is that Mike Padden and Ida Ballasiottes can't sleep at night thinking somewhere in Washington a prisoner is not miserable enough and that the DOC isn't doing enough to destroy prisoners' family relationships, health and other well being.

The following bad news for prisoners bills have been introduced: SB 5024 and HB 1109 were introduced at the DOC's request. If passed it would allow the DOC to charge prisoners for health care. The fee would not be assessed for emergency treatment, visits initiated by staff or for treatment of serious medical conditions. This type of law has been passed in several states and is being litigated there, as reported in *PLN*. In the event this law is passed we will likely reprint a legal article on litigation strategy to challenge this law.

SB 5030 amends RCW 9.94A.200 to allow the DOC to impose and modify sanctions for prisoners who violate the terms of supervised release. Until now such changes had to be made in court by the sentencing judge.

B 1117 would expand the definitions of prison rioting, hostage taking, weapons and drug possession in RCW 9.94.010 so that it would apply to detainees and prisoners in county jails and prisoners in transit between prison facilities.

HB 1288 would modify RCW 4.24.130 to prohibit prisoners from legally changing their name while in DOC custody. "Any person committed to a department of corrections facility shall not be granted the order to legally change his or her name under the terms and conditions specified in this section if doing so will interfere with legitimate penological goals. Name changes required for religious reasons or in recognition of marriage shall be allowed, however the Department of Corrections shall require the inmate to also use his or her committed name while incarcerated in a department of corrections facility."

HB 1136 states in relevant part "The department of corrections shall deposit no less than twenty-five percent of the total funds collected for inmate welfare accounts maintained by the department as authorized under this section into the public safety and education account for the crime victims' compensation program as

outlined in chapter 7.68 RCW." If this is passed Washington state prisoners should have standing to challenge this on the grounds that it violates due process (as a "taking") and as the intended third party beneficiaries of such funds.

HB 1049 would allow people to be convicted of "conspiracy" even if their "co-conspirators" were law enforcement agents who had no intention of committing the illegal act. This should be called the "entrapment law."

HB 1050 would add a new chapter to RCW 10.73 to allow state funded defense for criminal defendants on direct appeals, certain collateral attacks and more. It would also allow courts to assess the fees of legal representation involving juvenile defendants on the parents or legal guardians.

SB 5088 would substantially modify RCW 71.09.020 which allows for the "civil commitment" of "sex predators." The changes consist of widening what would be considered a "sex crime." It does not allow the release on bail of those accused under this law, it allows for a twelve person jury and allows for the conditional release to less restrictive facilities of some of those now held under this law.

If HB 1054 clears the house floor and makes it to the senate corrections committee Washington *PLN* readers will be notified, which may have happened by the time you get this issue. As we go to press still more anti-prisoner bills are being churned about by the wackos. To have a chance of being passed all non fiscal bills must be out of committee and on the floor of their respective house to be voted on by March 1, 1995. Any bills that don't make it out of committee in that time period are dead for this session. Anyone desiring copies of any of these laws, to check on their status and get the phone numbers and committee assignments of your representative can call 1-800-562-6000 or write: Bill Room, P.O. Box 40600, Olympia, WA. 98504-0600. Prisoners need to organize their outside friends and family to oppose these measures. As a first step writing and calling legislators to oppose these measures is a good start. ■

WA "Corrections" Committee

By Paul Wright

On September 6, 1988, Diane Balisiotes was killed by Eugene Kane, a prisoner on work release in Seat-

tle, Washington. Kane had been serving time for two assaults on women and was paroled despite DOC psychologists stating he was at high risk to re-offend. When Diane died a career was born. Her estranged mother Ida was on her way to becoming a professional victim and prisoner basher.

Ida rapidly grabbed the spotlight by founding "Friends of Diane" which initially sought to limit the number of work release fatalities in the downtown Seattle area. Ida filed suit against the state for \$3 million over Diane's death, claiming that the state was negligent for not supervising Kane. The case was settled for an undisclosed amount and Ida has been cashing in ever since, embracing on a full time career bashing prisoners.

Ida was active as one of the front people for Washington Citizens for Justice, the right wing group that includes John Carlson and David LaCourse that sponsored the "3 Strikes You're Out" initiative. In 1992 she ran for office and was elected to the state legislature as a Republican, representing Mercer Island. She is a primary backer of Initiative 159, dubbed "Hard Time for Armed Crime," which would significantly expand the state death penalty, among other things. [See *PLN*, Vol. 5, No. 8]

When the GOP seized control of the state house of representatives in November, 1994, she was appointed to head the "Corrections Committee." Her first two years in the legislature were lackluster ones she spent on the House Appropriations, Health Care and Judiciary committees. What are her qualifications to serve on, much less head, the corrections committee? Only a desire to bash prisoners and make already miserable lives even worse. Rather than holding responsible a system that takes petty criminals and turns them into killers and that she sued over for negligence, she has focused her hatred on all prisoners with an approach of vindictiveness and mean spiritedness. This is typified by calling on the DOC to stop providing prisoners with matches in the name of "saving money." In an agency with a budget that is close to half a billion dollars a year how much do matches cost? With a massively growing prison population, her "solution" is harsher laws that lock more people up for longer periods of time and turn prisons into bigger hate factories than they already are. This approach has been tried and failed for the past 20 years in this country and Washington.

But public policy and the public interest is not the driving force for Ida and the rest of the opportunistic politicians who ride to office bashing prisoners. With the collapse of the Soviet Union, communism is not a credible threat anymore. It is no longer fashionable to openly bash racial or sexual minorities which leaves prisoners. Prisoners today are to Ida and her ilk what Jews and communists were to the Nazis in 1930s Germany: the scapegoat for all the real or imagined ills afflicting society. Unable to vote and generally poor, prisoners and those who come to prison have no voice that anyone with power must listen to. It is politically safe to bash prisoners because there are no moneyed interests supporting them. Given Ida's obvious bias and personal agenda and lack of qualifications why is she heading the corrections committee? Would an environmentalist be appointed to head a committee on the environment? When was the last time a union representative headed a labor committee? Should public policy be decided by rational legislators or vicious hacks? It is the political equivalent of making Heinrich Himmler the ambassador to Israel.

A group of prisoners at the Washington State Reformatory in Monroe had invited Ida and the corrections committee to come to WSR to listen to their concerns and they agreed to come on January 2, 1995. On December 31, 1994, they canceled their visit. After all, nothing mere prisoners have to say will affect anything they do in search of the next sound bite or election ad. But many Washington state prisoners haven't gotten this point yet. In 1989 when Ida was just getting started cashing in on her daughter's death, prisoners at the Washington State Reformatory in Monroe overwhelmingly voted to give Ida's first prisoner bashing group \$10,000 from the prison's Inmate Welfare Fund. At the time I argued against it and on two occasions the matter came to a vote, I was the sole prisoner opposed to it. On that occasion, at least, Friends of Diane showed themselves to be less opportunistic than most prisoners in that they declined to accept the money from our welfare fund.

But the mentality of many prisoners remains the same. A large member of WSR prisoners said that they thought Ida could be "won over to our side" if they could just tell them about the prison's programs, how badly the parole board has treated them, etc. It is readily apparent

that is wishful thinking, at best. By canceling the invitation at the last minute Ida showed her contempt for those who invited her to the prison, after all, she could care less what any mere prisoner thinks or has to say. Just like the slave farmers of old did not consult with the field slaves about the decisions they were making, Ida isn't either. Ida has done well and gone far simply by bashing prisoners and milking her daughter's death for all it is worth, why should she stop now? Ida has become rich and gotten a lucrative political career out of viciously bashing prisoners, now she is setting state policy on these issues. Her "solutions" to crime and recidivism are to take away weights, family visits and make prisoners buy matches, I'm sure everyone will feel safer. Don't the people of Washington deserve better in terms of who sets their public policy on criminal justice issues? I know the prisoners do. ■

Confronting the Helms Amendment

In the December, 1994, issue of *PLN* we reported on and analyzed the federal crime bill and discussed one of its components, section 20409, which seeks to limit prisoners' ability to challenge prison overcrowding via class action suits. Elizabeth Alexander, Associate Director for Litigation of the National Prison Project, has written an excellent legal analysis of that section of the crime bill. She agrees with *PLN's* analysis of the amendment to the effect that it does not make any substantive changes to the law governing prison overcrowding actions

The paper discusses the power of federal courts to issue injunctions against overcrowding, class action certification, modifying consent decrees, etc. It also analyzes congressional intent in making the law as well as its practical effects. "Thus the legislative history of the Helms Amendment suggests that its intent was to reinforce existing constitutional standards, not to change them." Any attorney litigating class action or prison overcrowding suits should read Ms. Alexander's paper of the above title. It is available from the NPP, their address is on page 20 of this issue of *PLN*. ■

From the Editor

by Dan Pens

This is the best part about being an editor. Every other month I get to sit down and write whatever comes to mind. And I know it'll be read by over a thousand people. Hey! Wait a second... whatta 'ya flipping that page for? Oh well, at least I can *dream* about being read by a thousand people.

For those of you who keep up on such matters, the Preliminary Injunction in the *PLN* lawsuit against the WA parole board (ISRB) was denied. This PI would have allowed Ed Mead to resume "contact" i.e. correspondence and phone calls with us "convicted felons" in order to have a hand in publishing this newsletter (oops, Paul says we should call it a magazine from now on). I wish Ed could continue working with us here at *PLN*, but I understand he keeps himself busy and has been applying his talents and energy in other political areas.

What editorial would be complete without the pitch for more donations? Well, we don't aim to give you an incomplete editorial. I'd like to remind you all that postage rates went up in January, but *PLN's* rates didn't. Please continue to support *PLN*. Send whatever you can, when you can, and we'll keep 'em coming. Our suggested rate for individual subscribers is still \$12 a year. For Institutional subscribers the rate is \$35 a year.

We get a lot of requests for back issues. Especially numerous are the "if you happen to have a few old back issues laying around" requests. It's not that easy. If you need a *specific* back issue, please state the month and year, and send along \$1.00 to cover our photocopying and postage costs. We'll honor all requests as long as supplies last. If you want an entire set of back issues (or complete years) we're talking *major* photocopying costs. Complete sets of back issues are available for \$35 per year (\$25 for prisoners). Sorry about that. We're not in this to make a buck. It's just that photocopying, collating, folding and stapling large numbers of back issues racks up the old *Copy-Shop* bill pretty fast.

Now with the "business" stuff outta the way, I can get to the good stuff Paul and I have had some interesting political discussions this past month. He made me promise to say that what follows is not necessarily the view of *both* editors, but it does more or less reflect my *views*.

I spend a lot of time thinking about the way things are. Being the co-editor of *PLN*, I read and review a wide range of material written about prisoners, politicians, the media and the prison struggle. I think there must be a better way.

But when I try to imagine how things could be better, my focus always shifts from prisons to a wider view. I see the world differently than most people, especially from the way people in the free world see it. I see a world where the dynamics of competitions twist people into grotesque shapes. I see a world where decisions are based on the bottom line (how will this effect the quarterly profit and loss statement? How will this look in the polls?) rather than based on concern for the greater good.

Ten years ago, I believed that humans were inherently greedy, self-serving, violent and uncaring creatures. I believed it was only the moderating forces of law, authority, and society that caged up our vilest animal instincts and conformed us into "respectable" citizens. But then I took a 180 degree turn around. I began to believe that humans are inherently decent, loving gentle beings. Their innocence and compassion is lost only through a slow but steady process of competition—similar to the process of steel turning to rust. That was an important shift in my world view because it made me stop wondering what's wrong with *people* and start wondering about what's wrong with the *world*. What forces act upon humans to create the violence, greed, anger and malice that make this world such a mean, bitter place?

Let's talk about capitalism (this is where some people start rolling their eyes up at me). Capitalism is hailed as an efficient *economic* system, and that it may well be. But it is undeniably a brutal *social* system. Capitalism is based on profits and competition (at least where monopolies have not yet been established). The weak, i.e. not sufficiently profit motivated and not sufficiently competitive (ruthless), are vanquished by the strong. If you want to succeed in this country, in business or in politics, you *have* to be ruthless.

Does that sound a little too cynical? Often, I am accused of that by my wife. She reminds me (and rightly so) that not

all people are ruthless, competitive, and uncompassionate. And this, to me, points out one of the most glaring flaws of a capitalist society. If you concede that *most* people are decent caring and compassionate, then why does it seem that those who dictate policy (and I am not necessarily talking about politicians here) seem to be ruthless and self-serving? It's because the "market forces" of competition and profit motive rule not only in the area of product sales, but also in the social arena.

How do executives of corporations rise to positions of power? By worrying about the health and welfare at workers and consumers—or by sweetening up the profit margins for stockholders and investment bankers? How do politicians get re-elected and thus rise to positions of political power? By acting only for the good at humanity—or by reacting to the latest polls (based on "public opinion" which is carefully managed and manipulated by the corporate media) or by catering to the PACs who provide the money they *must* have in order to win a political campaign? It is because of this latter dynamic that the government is *not* "Of the people and for the people." Government is an instrument *of* and *for* the monied interests who keep their campaign coffers filled. ("Deep Throat" put it nicely when he told Woodward and Bernstein to "Follow the money. Just follow the money, it'll lead you to who's running this thing.")

When you take a step back and watch these social forces in action, it becomes clear that even if the *overwhelming* majority of people in a capitalist society are generous and compassionate, the natural forces of the "market" tend to reward those who are the *most* ruthless and self-serving to positions of power and authority.

Some of this is hard to see because we are immersed in a culture of competition. It's hard to step back and view things from a different perspective. We are schooled in the mechanics of competition from an early age. As we grow up we learn that what matters in life is to make the grade, win the game, get the highest SAT scores, gain the promotion, increase the profit margin or win the award. Win. Win. Win. We learn that there are winners and losers in life, and the goal is to be a winner. But under capitalism the vast majority of us lose. It's a system where only a very few can actually "win."

Being *aware* that a culture based on profits and competition may not be the best of worlds is only the beginning. Helping other people be aware of the

inequities and injustice of capitalism and the dynamics of how the system operates is another step. But what next? How can the system be changed?

This is where Paul and I part company. Unlike Paul, I am not a Marxist - Leninist. Marx and Lenin wrote not only of the contradictions and exploitation inherent in a capitalist society, they also wrote of a vision for a new society. I don't disagree with their basic analysis of capitalism. But I stop short of agreeing with their vision at a better system. And besides, at this point, I think *any* kind of political movement that has the tag "Communism" (or Socialism, Maoism, Marxism, etc.) will most certainly fail. Paul disagrees, but I propose the corporate press and ruling class interests have so thoroughly discredited "Communism" that it would be impossible to organize working people behind such a barrier. I think the world needs a Marx or a Lenin for the twenty-first century. I believe we need a new vision. And for my part... well, I'll keep my eyes and ears and mind open and I'll keep on thinking. ■

Prison Weight-Lifting is a Nonsense Issue

By Paul Wright

Across the country Republicans have seized on prison weight-lifting as a no risk political "issue" to make big hoopla over. The corporate media has abetted this by running sensationalist stories of prisoners bulking up by pumping iron. So far Mississippi and Wisconsin have banned weights in prison. The California legislature has required that the DOC submit a plan so prisoners can use weights but not build strength or bulk. The Washington state legislature is going to consider the matter this term, it is being pushed by Mike Padden, the anti-abortion Republican from Spokane and Ida Balasiotes, the professional prisoner basher who heads the "corrections committee" in the state house.

Prisoners have been lifting weights in Washington for over forty years. How many people outside prison knew or cared about this until the Republicans and media made it an issue? None. Weight lifting has been popular in prison for decades with both prisoners and their keepers for several reasons.

Prisoners like to pump iron because it represents an opportunity for intense

work outs and solid exercise year round, even when prison yards are closed due to rain, fog, snow, etc. Some prisoners lift weights as a means to release tension, build discipline, etc. In other words, pretty much the same reasons non-prisoners lift weights. Where Washington state prisoners in population are locked in their cells 20 or 22 hours a day, an hour on a weight deck is the only meaningful exercise they will get. Prisons tend to be sedentary in nature with little opportunity for movement or activity. Without exercise the health problems associated with such a lifestyle combined with the environmental dangers associated with prison (inadequate ventilation, fat and cholesterol saturated food, etc.) are amplified. Regular exercise such as weight lifting boosts the immune systems, reduces the risks of cardiovascular disease and improves people's overall health. With a rapidly aging prisoner population prisoners should be encouraged to maintain their health - not deprived of the opportunity to do so.

For prison officials, weight lifting is popular because it takes up very little room, is easy to supervise by guards, gives prisoners something to do that isn't illegal or dangerous and provides a privilege that can be withdrawn for misbehavior. By constitutional law prisoners must be provided with an opportunity for at least one hour of exercise which allows for strenuous work-outs to reduce large muscle deterioration. Weight lifting allows prisoner officials to meet this legal obligation.

Politicians wanting to take the weights claim they are concerned about "costs" and that taxpayers shouldn't be paying for weights. They know full well that is a lie. All recreation equipment in Washington state prisons, as well as in most other prisons in the country, is bought and paid for by the prisoners themselves. The money comes from the profits made from selling goods to prisoners from a commissary (soda pop, cigarettes, etc.) at inflated prices. Not a penny of taxpayer money goes towards weights and other recreation items. Another reason that weight lifting is popular in prisons is because it is extremely cheap, consisting mainly of iron weights that rarely need to be replaced.

The reality is that prison weight-rooms are not equipped with any type of state of the art exercise equipment. Prison weight rooms are hardly comparable to a free world gym or exercise club. When politicians claim that prisoners shouldn't be able to lift weights when free people have to pay

Weight Lifting (cont.)

a gym to do so, remember that we are paying to lift weights, quite literally with years of our lives. Nothing is "free" in prison, it is all paid for in one way or another.

So, if the two parties most affected by prison weight lifting, guards and prisoners, support it why is this an issue? Because Republican politicians see it as an easy slam dunk to garner publicity and distract voters from real issues such as their agenda to reduce taxes for the wealthy, limit abortion and otherwise make the rich richer and the poor poorer. Neither the democrats nor other politicians are going to take any type of stand on this issue because prisoners aren't a constituency anyone has to cater to, being poor and unable to vote to boot. The real agenda is take away what modest privileges prisoners have and replace it with idleness which has historically led to violence in already overcrowded prison systems.

Their political cover is that weight lifting is a public safety hazard because "criminals are bulking up." Anyone familiar with weight lifting or exercise knows this is a crock. First off, when was the last time someone was attacked by a weight-lifting ex-con? Secondly, however much bulk someone puts on (many weight-lifters train for tone and not bulk) it is quickly lost if the person doesn't continue working out. Given the proven health benefits of over 40 years of prison weight lifting, its detractors have speculation and sheer demagoguery. But, like all other aspects of the hoopla, I can't bring myself to call it a "debate," facts and reason have nothing to do with the matter. Will a ban on weight lifting stop prisoners from "bulking up"? I'll be doing pushups and calisthenics as will many others who want to stay in shape. The best shape I've ever been in was after getting out of any basic training, did we lift weights? No, just a lot of calisthenics. Guess what legislators have prisoners in so called "boot camps" doing? You got it, a lot of calisthenics. So what's next? A law banning pushups in prison but not boot camp? Once the weights are gone, what next? Within a year what voter or free person will even remember anything about weights in prison? We know the answer to that one, none. ■

Ohio Offshore Industries Project

by Dan Cahill

In the state government's effort to market prisoners as cheap labor it has unveiled the Ohio Offshore Industries Project. This marketing campaign offers companies a vast pool of cheap prison labor as an attractive alternative to foreign based production. Companies have been moving overseas to take advantage of cheap labor, and the government hopes to keep these companies in the U.S. or lure them back by offering prison laborers. Overall this project is an effort to stop economic decline, and it also helps reduce the cost of imprisonment.

Ohio's Department of Corrections (ODOC) has entered into a contract to supply space and laborers to a private firm called Unibase. Unibase is a data processing company that has eighteen of these work programs in prisons across the country.

The work involves entering data into computers, and prisoners are paid a base rate of \$0.47 an hour, plus an incentive pay based on keying speed. The incentive pay rate has been lowered continuously to a point where workers can not key in data fast enough to earn more than the base pay of \$0.47 an hour. Unibase is attracted to this cheap labor, and knows that prisoners cannot legally organize unions, and are not covered by Workers Compensation or the Fair Labor Standards Act (FLSA). Prisoners can't voice complaints except at the risk of incurring the arbitrary discipline of prison officials, and can be hired, fired or temporarily laid off at will.

At the Lebanon Correctional Institution, Unibase has the highest disciplinary rate of any job assignment. Prisoners working for Unibase forfeit educational, treatment and religious programs. Unibase workers at Lebanon must even forgo laundry services because the laundry schedule interferes with the Unibase workers' schedule. They have difficulty getting showers or going to commissary for the same reason. Verbal abuse and harassment of Unibase workers are a daily occurrence.

Prison officials are telling the public that this type of work program is helping the economy by preventing the loss of U.S. jobs to cheap foreign labor markets. They say they aren't taking jobs away from U.S. workers on the outside, but

creating new jobs for staff and supervisors. However, before Unibase opened the work program at the Lebanon prison, the same general manager who runs that program closed a data processing office in Kentucky and let go all of the workers. The equipment and work was brought directly from the closed Kentucky office to the prison in Ohio. So, in at least this case, it did cost free U.S. workers their jobs.

Ohio prison officials will continue to market cheap prison labor to any company that shows interest, and has plans to expand the Ohio Offshore Industries Project to Community Correctional Facilities. This will enable the state to offer prison labor directly to factories on the outside.

The concept of exploiting prisoners as a cheap form of labor is not new, and serves no rehabilitative purpose. It actually makes it harder to break the cycle of poverty and imprisonment by taking real wage jobs away from real world workers. Anyone who wants more information about this concept, or who would like to write a letter of protest can write or call:

Reginald Wilkinson, Director
Ohio Department of Corrections
510 Freeway Drive North
Columbus, OH 43229

Unibase
510 West Parkland Drive
Sandy, UT 84070
(801) 567-5000
fax: (801) 567-5003

[Editor's Note: Dan Cahill receives a one year gift subscription for publication of this terrific article. We would like information from other U.S. prisoners about the expansion of this type of prison/industry partnership to exploit U.S. prison labor. Here in the state of Washington, a bill was passed mandating the expansion of prison industries, with a yearly goal schedule for the number of prisoners to be employed. The Washington State Reformatory has recently opened a large new industries building connected to the prison through a gate in the back wall. The state has been actively enticing private industries to move into the vacant factory space. Typically in this type of partnership, the industrialists get cheap, exploitable labor and extremely cheap leases on the prison factory space. The Department of Corrections receives some kind of a kick-back for the labor, either in the form of direct payment from the industry or by deducting "Cost of Corrections" from the worker's pay. By

using this second method, industries who are required to pay at least minimum wage by the FLSA can give the appearance of doing just that. Prisoners are "paid" the minimum wage and the DOC deducts 50 - 80% for cost of corrections. It's a sweet deal for the industrialists and the DOC, at least as long as the factories and their equipment operate smoothly.]■

News in Brief:

Morocco: On November 24, 1994, the Moroccan Human Rights Organization reported that the head of Morocco's delegation to a UN anti-torture conference was Kadouri Yousfi. Yousfi now heads the Moroccan national security apparatus but in the 1970's and '80's he was warden of the infamous Derb Moulay Cherif jail in Casablanca where thousands of prisoners and detainees were regularly tortured. The group said that sending Yousfi to the anti-torture conference made it skeptical of the willingness of the US backed regime of King Hassan II to stop torturing its citizens.

Mexico: On December 11, 1994, 17 prisoners in the CeReSo prison in Ciudad Juarez escaped by digging a tunnel 80 yards long from a prison cell to an orchard outside the prison. Prison officials learned of the escape after the prisoners were seen running down a city street. They then found a hole in the wall leading to the tunnel. The tunnel was elaborate, having electrical wiring and an air compressor that supplied oxygen. In May, 1994, four prisoners broke out of CeReSo after receiving automatic weapons from men posing as attorneys. On December 18, 1994, sixteen prisoners escaped from the Nuevas Casas Grandes prison near Ciudad Juarez by tunneling out of prison. Police said the prisoners built their tunnel from a workshop area close to the wall and exited just outside the prison wall. The tunnel was six feet deep and 33 feet long and had electrical wiring and lights. The two escapes do not appear to be connected.

FL: Gulf County (Pensacola) Sheriff Al Harrison was charged in federal court on December 15, 1994, with coercing women prisoners into having sex with him. He pleaded not guilty to the charges, 10 counts of violating the civil rights of five female prisoners. The sex acts allegedly occurred in the county jail in Port St. Joe between December, 1989, and Febru-

ary, 1994. Harrison was released on his own recognizance pending trial on January 23, 1995; he denied committing the sex acts. State officials are also investigating complaints that he demanded sex from Sheriff's Department employees as well, including one who committed suicide after reporting that Harrison had demanded sex from her.

Mongolia: On December 23, 1994, Amnesty International released a report stating that more than 30 prisoners starved to death in Mongolian jails and another 60 died of untreated illness and mistreatment in the past year alone. An AI spokesperson said "It seems starvation is acute, especially during pre-sentence detention. When prisoners arrive in labor institutions they are already so malnourished it is difficult to improve their conditions. Every prison sentence could become a death sentence given the present conditions in Mongolian prisons." The Mongolian government is aware of the problem and wants to improve its prison conditions, it has asked for United Nations assistance to train prison guards.

Philippines: Forty political prisoners went on an indefinite hunger strike on January 3, 1995, to protest the Philippine government's refusal to recognize them as political prisoners. The prisoners are mainly communist members of the New People's Army. The Philippine government denies the existence of political prisoners, claiming all prisoners have been convicted of criminal charges.

FL: On January 3, 1995, six Cuban prisoners escaped from the Glades Correctional Institution by digging a tunnel under a prison fence. The 45 foot tunnel began in the prison chapel and exited outside a fence under an unmanned guard tower. Prison guards fired at the prisoners after they popped out of the tunnel and set off electronic alarms. One prisoner was recaptured immediately afterwards, four of the others were recaptured within the next week. One remains at large as we go to press.

Guinea: On January 3, 1995, sixteen prisoners were killed in a fight at the central prison in the country's capital of Conakry. The killings began when some of the prisoners accused others of having turned them into police. Shortly after their recent arrests some of the prisoners who were killed had threatened, on Guinean TV, to name senior government

officials they claimed were involved in their crimes which include a national crime spree of robbery and murder.

NY: State officials paid \$121,375 in back wages and \$3,000 to pay for therapy sessions to Patricia Henley. Henley was fired from her job at Austin McCormick Center, a juvenile prison, after she complained of routine brutality, beatings and mistreatment of the youths. Her complaints led to a state investigation that documented her claims and showed a clear pattern of brutality dating back to at least 1986. She filed suit in May, 1991, seeking back wages and reinstatement under the state's whistle blower law. In the settlement she waived her reinstatement claim. She was also awarded \$40,500 in attorney fees.

Columbia: On January 8, 1995, communist guerrillas of the FARC entered the town jail of Mocoa, capital of Putumayo province, dressed in government military uniforms and told jail guards they had arrived to inspect the jail. Once inside the jail they overpowered the guards, opened the cell doors and freed all the prisoners, nearly 100. No shots were fired and no one was injured in the takeover. A number of the freed prisoners were captured guerrillas. At least 25 of the freed prisoners had turned themselves back in to government authorities claiming the guerrillas had forced them to escape.

NJ: In 1994 the state legislature passed a law requiring that police notify the public whenever a convicted sex offender is released or moves into a neighborhood. The law requires that all convicted sex offenders register with police who then notify the public. Michael Groff was released from prison after serving four years for sexual assault. His name, photo and address were publicized by police. On January 8, Kenneth Kerekes Sr. and his son, Kenneth Jr., broke into the home Groff was staying at intending to beat him. Instead, they assaulted and badly beat Thomas Vicari, a truck driver staying at the same house who is not a felon. Both Kerekes were arrested and charged with burglary, harassment, conspiracy, assault and criminal mischief. Kenneth Kerekes Jr. is employed as a prison guard at the Northampton County Prison in Pennsylvania. Federal judge John Bissell of Newark entered an injunction barring further implementation of the notification law pending a hearing on the merits.■

Legal News

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A Viable ACA Litigation Strategy

by Little Rock Reed

On August 6, 1982, David Bazelon, Senior Circuit Judge for the U.S. Court of Appeals for the District of Columbia, resigned from the Board of Commissioners of the Commission on Accreditation for Corrections (American Correctional Association). In his Memorandum of Resignation, Judge Bazelon stated:

"I will soon complete two years of my 5-year term in the Commission on Accreditation for Corrections. During my tenure, I have repeatedly called on the Commission to make some fundamental reforms in its fact finding procedures and

in its relationship with the corrections community. The Commission has repeatedly refused to take the meaningful steps to guarantee its independence and to insure the integrity of its decisions. The Commission has therefore broken faith with the public and has betrayed the promise of accreditation."

In his Memorandum, Judge Bazelon stated that "the history of corrections in America, I believe, is best characterized as a conspiracy of silence between corrections officials and the public." He pointed out that the federal courts "have begun to back away from enforcing the eighth amendment's ban against cruel and inhumane prison conditions." In this climate, Judge Bazelon wrote, "the concept of accreditation is especially vital, for it offers one of the few hopes for rational and humane reform in corrections. The real promise of accreditation is that the conspiracy of silence between corrections officials and the public can be replaced with a partnership for reform."

Bazelon pointed out that when he was asked to join the Commission, he believed that its accreditation program "was fulfilling this noble promise," but that it was now apparent that it had no intention of fulfilling this promise. He explained that shortly after joining the Commission, he discovered that the American Correctional Association's (ACA) *Statement of Principals*' promise of "public participation" in the accreditation process has not been kept. "The public is systematically excluded from every stage of the Commission's work," he stated, providing details. He even quoted the ACA executive director at the time, Anthony Travisono, who warned his colleagues at

its annual meeting in 1982 that "the Commission will fold in one year's time if this opening of the process is permitted to exist." Similarly, Commissioner B. James George warned that openness would be "sheer suicide" for the ACA. Judge Bazelon also cited Robert Fosen, the Commission's executive director, as arguing that if information about prison conditions is to be broadcast to the public, "all kinds of persons will be critical" and this "will simply upset . . . our integrity." Judge Bazelon correctly noted that the premise of these remarks - - "that either accreditation is run the way that prison officials want it to be run, or else - - is an insult to the public."

In addition to criticizing the ACA's systematic exclusion of the public's scrutiny and participation in the accreditation process, Judge Bazelon set forth detailed facts substantiating his claim that:

1. The Commission's audit techniques and deliberative procedures are inherently unreliable.

2. The Commission is unwilling to accommodate constructive criticism and the possibility of meaningful change.

3. The Commission's priorities are fundamentally flawed.

4. The Commission has pervasive conflicts of interest with the facilities it is charged with monitoring.

5. The Commission has permitted the accreditation movement to be transformed into a propaganda vehicle for corrections authorities.

According to the facts set forth in Judge Bazelon's memorandum, there are no actual audits conducted by the ACA of the facilities it sells accreditation to (the sales of which are *all* achieved through

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ACA (continued)

taxpayers' money). The only evidence considered by the Commission is the self-evaluation of the applicant institutions and the report of an audit team that refuses to interview prisoners unless they are pre-selected by prison officials.

Moreover, the Commission has stated that its first priority is not to insure that its minimum standards of accreditation are complied with by the facilities it sells accreditation to, but to simply "encourage as many facilities to join the accreditation process as possible." The fact is, if the prison has the money, it will have the ACA's accreditation, regardless of how brutal the prison's conditions. Judge Bazelon noted that in the words of the Commission's own former chairman and treasurer, Gary Blake, "[if we did take a more active role in investigation], I think we could kiss the whole process of accreditation goodbye."

Judge Bazelon stated that time and time again he has seen or heard of instances in which corrections officials have used their accreditation by the ACA "to deflect public criticism and scrutiny of their management, to boost their standing with governors and legislators, to ward off judges and lawsuits, and to pat themselves on the back. They have used it to paper over the crisis in corrections with certificates of 'excellence.' They have used it, in short, for their own propaganda purposes."

NOTHING CHANGED

Nothing has changed since Judge Bazelon resigned from the ACA. In fact, prison conditions have deteriorated even more in the past decade. It was the Southern Ohio Correctional Facility's accreditation process beginning in 1990, for example, that allowed policies and conditions to become so brutal that the Easter 1993 uprising resulted in which 10 people were killed and 40 seriously injured. The ACA received complaint after complaint from prisoners and outside supporters regarding the prison's blatant disregard for the ACA Standards, and demanded an investigation into the brutal conditions. However, the ACA summarily dismissed these outcries, choosing instead to admonish those of us who cried out not to interfere with the accreditation process. Now, after the riot, the director of the Ohio prison system has been

elected to serve as the ACA's executive director. Is this a conflict of interest, or what?

Many individuals and organizations are becoming increasingly upset with the American Correctional Association. One example of this was brilliantly highlighted in the winter 1992 edition of *The National Prison Project Journal* (of the ACLU), an article written by Betsy Bernat, the editorial assistant of the journal. In her article, she described the brutal beating of a prisoner in the Louisiana State Penitentiary by two prison guards while the prisoner was in handcuffs and leg irons and a lieutenant stood by and merely cautioned his comrades "not to have too much fun." In a *pro se* lawsuit, the U.S. Court of Appeals for the Fifth Circuit ruled that the prisoner had no viable claim under the 8th Amendment ban on cruel and unusual punishment, because a cracked dental plate, loosened teeth and a split upper lip didn't constitute a "significant injury." The prisoner's petition for writ of *certiorari* was granted

by the Supreme Court in April of 1991 (*Hudson v McMillian*), and Alvin J. Bronstein, the executive director of the National Prison Project, was appointed to represent the prisoner. In Betsy Bernat's article, she wrote, "Bronstein argued Hudson's case in the Supreme Court on November 13, 1991, maintaining that 'significant injury' should not be a requirement of an 8th Amendment claim. His argument was supported by an impressive group of *amici* (friends of the court). The office of the U.S. Solicitor General not only filed an *amicus* brief but also argued a portion of the case. Americans for Effective Law Enforcement, Human Rights Watch, and two prisoners' rights groups also filed as *amici*." Bernat pointed out that the beating of the prisoner was "in complete violation of the standards established by the [ACA]." Yet, when invited to join as an *amicus* on behalf of the prisoner, the ACA declined. ACA president Helen Corrothers wrote to Bronstein that the ACA Executive Committee rejected the

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Article Submissions

We solicit well written articles about prison legal issues, prison struggle, legislation that impacts prisoners and news about prison issues that may be of interest to a national readership. We are particularly interested in well researched legal analysis of specific prison rights issues. An article that provides a broad overview of case law on one specific issue, with case citations included, is especially helpful to our many readers who have little or no access to law libraries.

Please send only copies of clean, crisp typed or legibly printed material, as we cannot return manuscripts without an SASE. We reserve the right to make minor editing changes, but any major re-writes will be sent back to the author for approval before publishing.

Any submissions we publish will be given a byline, unless requested otherwise, and the author will be awarded a one year gift subscription to PLN.

Mail submissions to: Dan Pens #279308 or Paul Wright #930783, PO Box 777, Monroe, WA 98272-0777. Or to PLN, PO Box 1684, Lake Worth FL, 33460.

ACA (continued)

two invitations to get involved because the Committee felt it was not "in the best interest of the ACA." Indeed not.

Bernet concluded her article by pointing out that Bronstein then wrote to all members of the ACA Standards Committee: "I thought I should share with you the fact that, once again, the ACA leadership has demonstrated that ACA standards are not professional correctional standards. Rather, they are a collection of words and phrases relied on selectively by various ACA officials when it serves their interest (e.g., as a defense to a conditions lawsuit; as a means of getting funds from the legislature). The ACA Executive Committee action — non-action might be a better description — makes a sham of the whole standards and accreditation process."

PLAN OF ACTION

Sham indeed. I would call it embezzlement and fraud, and I say let's bring them to their knees. I think ACA accreditations could easily be destroyed within two years if we can pull together one prisoner or non-prisoner from each of the states who are willing to write a few letters and compile some information. Let's discuss strategy.

Every prison in this country that is accredited by the ACA is required to comply with ACA standards, but few, if any, are in full compliance, as the ACA well knows. The ACA has demonstrated time and time again that it will sell accreditation to any prison that doesn't meet its standards so long as the required fees are paid. The legal implications and ramifications of this sham are quite broad, ranging from criminal conspiracy, embezzlement and fraud to constitutional violations under the first, fourth, fifth, eighth, ninth and fourteenth amendments of the U S Constitution and an endless variety of state laws. In my opinion, we can probably even be successful at getting some ACA officials convicted under the RICO ACT. But, of course, I can't do it by myself, and I won't pursue the matter any further if I don't hear from prisoners and/or non-prisoners in at least 10 states who are willing to work with me on this. I've got enough of my own troubles to worry about fighting for anyone who isn't willing to fight beside me.

This strategy will require that contacts from a significant number (12 is a good number—we could be known as the "dirty dozen"!) of states actively participate in the following:

1. Review the ACA standards and document non-compliance with the standards by at least one prison that is accredited by the ACA.

2. Correspond with appropriate ACA officials in order to establish the ACA's deliberate indifference to the prison's failure to comply with the standards.

3. Research applicable state laws that can be invoked under a federal court's pendant jurisdiction in a § 1983 action against the ACA.

4. Prepare and file litigation *pro se* along with a motion to proceed *informa pauperis*.

This should be about a one-to-two year process to effectively defeat dismissal or summary judgment so that further discovery may be obtained (under the Federal Rules of Civil Procedure), and you will be provided with expert advice and assistance with legal research and the preparation of correspondence, grievances and litigation. I discussed this strategy briefly with a number of people who attended the annual conference of the National Lawyers Guild a couple of months ago, and I think I can reasonably assert that there are lawyers who will assist with this project when a significant number of prisoners and their supporters have demonstrated a commitment to this strategy.

Conceivably, a number of lawsuits could be filed in one federal district court all on the same day. Participating lawyers could ask the court to consolidate the lawsuits into one ferocious class action for reasons of judicial economy (once class certification is granted, every prisoner in any prison in the country that is accredited by the ACA will become a plaintiff and will be notified according to law.) If this doesn't get America's attention, nothing will. But it will!

I have recently accepted the position of vice president for the Center for Advocacy of Human Rights (CAHR), and I am forming a prisoners' rights division with the CAHR. This division's sole purpose at this time is to proceed with the strategy outlined above. If you're interested in becoming active in

this project, get in touch with me, and we'll get started. Any ideas from experienced prisoners' rights activists and lawyers (including *good* jailhouse lawyers) are welcome.

Because neither the CAHR nor I have any funds (donations for this project *would be* appreciated and are tax-deductible), please send a self-addressed stamped envelope when you write, or you probably won't get a response, 'cause we can't afford it. I look forward to hearing from you and working with you. **Write to me NOW!**, and let's kick butt!

In solidarity

Little Rock Reed
c/o CAHR
P.O. Box 880
Ranchos de Taos, NM 87557■

CDC Issues New Shooting Policy

In the March, 1995, issue of *PLN* we reported that the FBI was investigating the California Department of Corrections' (CDC) policy of shooting prisoners. That policy had led to CDC guards shooting and killing at least 27 prisoners between 1989 and 1994, compared to eight in the other 49 states and federal prison system. In January, federal judge Thelton Henderson ruled in *Madrid v. Gomez* that excessive force was routinely and excessively applied against prisoners, and violated the eighth amendment. [An upcoming issue of *PLN* will report on the ruling.]

On January 20, 1995, the CDC issued emergency regulations prohibiting guards from shooting prisoners to break up fist fights. Until now, guards with high powered rifles had routinely shot prisoners engaged in fist fights. Armed guards are posted within CDC prison security perimeters, even in the housing units.

As part of the changes in the shooting policy the CDC is issuing non lethal weapons to guards, including pepper gas, to provide an alternative to shooting and killing prisoners in fist fights and other minor altercations.■

Source: *New York Times*, 1/21/95

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. Recently the National Lawyers Guild (NLG) Prison Law Project (PLP) held elections in order to elect five prisoners to its steering committee board. I was nominated for one of the slots and asked if I would run. I accepted and set doing public outreach and education on prison and criminal justice issues as a priority. I was both pleased and surprised to see the number of quality prison activists running for the slots, many of whom are *PLN* readers. Jailhouse lawyer members of the PLP across the country voted and I was elected along with Marcia Bunny, Beverly Seymour, James McGourty and Joseph Everroad. Many *PLN* readers have written and said they voted for me. I would like to thank all the *PLN* readers who did. I'll do my best to ensure that prisoners' interests are well represented. This is the first time I have held an "elected office" as it were. It also goes to show that people can openly campaign as a Marxist-Leninist and get elected; it's all about representing people's interests. Anyone interested in learning more about the NLG / PLP can see their ad on page 20 of this issue. Needless to say, I encourage jailhouse lawyers to consider joining the NLG if they agree with its principles.

The stepped up attacks on prisoners across the country and Washington (both of them) have resulted in a flurry of activity at *PLN*. This includes Dan and I having to work on local struggle issues in addition to *PLN* related stuff. The result is that between trying to keep up on writing articles for *PLN* and other publications, answer both *PLN* and personal mail, maintain relationships, etc., we're feeling a little overwhelmed, at least I am. From the looks of things it's going to get a lot worse before it gets better. To help us keep on top of things it helps if article submissions come to us already written and typed. It is a lot easier and quicker to run a finished article that only has to be re-typed or scanned in than it is to read through a lot of newspaper clippings, legislation, etc., and write the article ourselves. So keep the clippings and article submissions coming. One of the things we are especially interested in is news of struggle by prisoners, especially the stuff that the mainstream media does not cover. If there is a strike or similar struggle, let us know. Tell us why it took place, the results, demands and the details of the drama.

One thing folks can do to lighten our load is cut down on the frivolous mail. Periodically we have to state that Dan and I aren't here to do people's legal research or play one hundred legal questions. You need to do that on your own. *PLN* is a tool to help you help yourself (which is why you should always read the cited cases yourself). The other thing to realize is that we are in the same boat as other prisoners across the country. When you write and ask that we do this or that it simply doesn't take into account the fact that there isn't a whole hell of a lot I can do from my prison cell to help. This is especially true from those who claim they are unjustly imprisoned, have been mistreated by their captors, etc. Our goal is to help prisoners help themselves because all too frequently no one else is. If you write and you absolutely must have a reply send an SASE. When we first started out Ed and I used to answer every letter

received. We stopped doing that a while back because both the volume of mail increased and so has the junk mail. If we answered all the junk mail (especially from those seeking pen pals, their personal legal assistant, etc.) nothing else would get done.

Also, when you do write letters to us please make sure that your name and address is on the letter. Letters and envelopes usually get separated during processing which means that we sometimes don't know who wrote what. There has also been an occasional problem of folks sending donations from prison accounts and all we get is a check with a name on it and no indication of where the *PLN* is supposed to go (the BOP is especially bad on this). If your captors require that your number be on your address then please be sure to include it. While most prisoners detest using their DOC numbers, especially if it is not required, it actually helps us process and deliver your issues of *PLN*. You would be surprised how many people have the same or similar names. The DOC numbers help us keep track of readers and tell them apart. Each subscriber also has their own subscriber code (the four digit number on your label) so if you write about your subscription, i.e. change of address, not getting issues, etc. it helps if you refer to your subscriber number when you write.

We often get requests to endorse or advertise various products and services. In general we have never been too keen on running ads, for a variety of reasons. But we don't review or plug products such as books, magazines, etc., unless we have actually seen it for ourselves. The reason we do this is to ensure that readers aren't being ripped off (we ask ourselves if we would pay "x" amount for a given product and if we'd feel ripped off if we did) and that we only use our limited space to plug products worth using. That is why you never see a negative review in *PLN*, if it sucks we won't waste our space telling you.

I'll wind up this particular tirade by mentioning something that I find especially annoying. That is the people, quite a few of late, who write and want *PLN* to plug this, plug that, send them this information, or do that for them, and they aren't even subscribers! Given the fact that we are solely reader supported, and rely on that support to continue publishing, it is galling that freeloaders want to exploit a non-profit resource. Of course, it doesn't help when I ask people why they don't subscribe when they can well afford to do so and they respond with "I read my neighbor's issue" or "We just want to market product X." Well, if they aren't willing to support *PLN*'s viability as a prison resource then *PLN* shouldn't support them.

When we started *PLN* we had high expenses because we were photocopied and mailed first class. Over the years we progressively cut those expenses by going to offset press printing as a 16 page magazine, getting a bulk mail permit, and other cost cutting measures. Lately, as we grow, our costs are starting to creep back up. We moved our printing to the East coast in order to bring you 20 pages at the same cost we were bringing you 16 from the west coast. Growth meant that *PLN* was too unwieldy to continue using volunteers to mail us, so we have a mailing service now that tacks on 6 cents an issue. The printer folds *PLN* for mailing which adds a penny. We have now started inserting fly cards which we hope will increase our subscription and donation rates, which costs a little more. So as we get more paid readers we are able to bring you more. We would like to ask you to donate what you can when you

can in order to help us keep up with our expansion plans. The only way we can keep our costs down is to increase our readership so we can increase our print run. The more issues we print the lower our per issue cost.

Here are some interesting *PLN* facts, as of March 6, 1995, we had 1,419 readers in all 50 states, the Virgin Islands and Puerto Rico (plus another 150 or so in 26 other countries). Of these 1,419 readers, 860 were prisoners (61%), 417 were non prisoners (30%) and 129 were institutional subscribers (9%). For the first time, California has surpassed Washington as the state with the most *PLN* readers, 188 compared to 182 readers in Washington. What is interesting is that over half the California readers are locked up in Pelican Bay and Corcoran control units. The only states we have more than 50 readers in are: TX, NY, PA, WI, FL and MA. In some states our entire readership is prisoners. In others, the non prisoners outnumber the prisoners. If you can encourage others to subscribe to *PLN* please do so, we rely on your efforts to reach more people. We can send a bundle of 25 *PLN*'s if you can help out by sending 10 stamps to cover postage. Likewise, we can send sample copies to folks on request, just send \$1 to help us cover our costs. In addition to cutting down our printing costs, more readers translates into faster mail service. When we have more than 125 readers in a given state, our mailer can send those issues directly to that state which cuts about three steps of mail sorting out of the process.

As *PLN* has grown we are also becoming better known and increasingly relied upon as a resource. Starting with our January, 1995, issue we are being indexed by the *Criminal Justice Periodical Index* and by the Department of Justice's publications database. This means that when researchers, scholars, etc. are seeking literature on a given issue or area, *PLN* will be among the sources they can consult and refer to. This is extremely important in terms of the longevity of our impact. All too often prisoners' voices are excluded, suppressed or forgotten. So when historians go back to write, or rewrite, history they wind up relying on contemporary sources that belong(ed) to the ruling class. This is why we try to encourage library subscriptions too. That's all for this issue. Enjoy *PLN* and pass it along to others so they can subscribe too! ■★

Pierce County Jail Sued

On January 19, 1995, a class action suit was filed against Pierce County (Tacoma, Washington) concerning massive overcrowding at its jail. The jail was built in 1984 and designed to hold 470 prisoners, it was later remodeled to hold 628. On January 17, 1995, the jail held 1,026 prisoners, more than 400 beyond its design capacity. Since 1989 Pierce County has operated a satellite jail in a national guard armory which holds 154 prisoners. Despite massive overcrowding the jail holds prisoners from other jurisdictions (federal government, cities, etc.) on a rent-a-cell basis.

The overcrowding requires that many prisoners in the jail sleep on mattress pads on the floor. Prisoners spend between 2-4 weeks sleeping on the floor until they acquire seniority to be assigned a bunk. Prisoners lose their seniority if they are moved to another unit. This happens frequently which results in some prisoners spending months sleeping on the floor. Even obviously pregnant women are forced to sleep on the floor under these conditions.

The suit contends that forcing people to sleep on the floor for prolonged periods of time creates an unreasonable risk of injury to the prisoners. The risk results from tripping over mattress pads and because the lack of privacy enhances the tension in the units, the risk of being assaulted increases. Many assaults arise from one prisoner stepping on another's mattress pad.

The overcrowding has resulted in the jail classification system ceasing to exist. Detainees charged with serious felonies such as rape, murder, etc. are assigned to live with pretrial misdemeanor detainees and sentenced misdemeanants serving sentences for non-violent offenses such as traffic offenses, failing to pay fines, etc. Mentally ill detainees, very young, etc. prisoners are housed together in the general population. In one unit, male and female prisoners are housed together in the same unit, in individual cells, and share the same shower. Staffing levels have not kept up with the jail's population increase resulting in inadequate supervision which results in heightened risks to staff and prisoners.

The complaint alleges that the overcrowding has resulted in a number of prisoners being assaulted. The stress and assaults are directly related to the overcrowding and understaffing at the jail. Medical care at the jail is, in the words of a consultant hired by the jail, a "non-system." The jail's health care program is disorganized, lacks sufficient staff and fails to meet the community standard of health care. Medical staff are not adequately trained or supervised and the staffing levels are grossly inadequate for the jail's population level, and has been for many years. The jail does not even provide 24 hour a day medical staff coverage. Jail guards, with no medical training, are required to evaluate medical emergencies that arise in the evenings or on weekends. Prisoners wait days or weeks after requesting medical care before they are seen by medical staff, in many cases they do not see a doctor. There is no "in person" medical requests, so prisoners who can't write or who don't speak English are unable to access jail medical care.

Dental and mental health care at the jail is inadequate and minimal. Mental health "treatment" consists almost entirely of giving prisoners drugs. "Because of the defendants' policy and practice of providing inadequate staffing levels, anti-psychotic, anti-depressant, or sleep medications are often prescribed by the physician or physicians assistant without them actually seeing the patient first and without assurance that a psychiatrist would see the patient in a follow up visit." Likewise, there is no contagious disease control or monitoring. Many prisoners in general population have active stage TB.

The suit also challenges the jail's practice of charging prisoners a fee each time they seek medical attention. The practice is dangerous because it forces indigent prisoners to choose between purchasing basic hygiene supplies and seeking necessary medical attention.

Sanitation in the jail is grossly inadequate to cope with the number of prisoners it now houses. The jail also violates prisoners' right of access to the courts because it does not provide law library access or the assistance of persons trained in the law for detainees seeking to pursue civil litigation. The suit also alleges that excessive force is used by guards on a routine basis and that the jail has no functional grievance system to resolve complaints administratively.

The suit seeks relief under the state and federal constitutions and several statutes. The complaint seeks declaratory and injunctive relief to remedy the above problems and attorney fees. The suit was filed by counsel for Evergreen Legal Services and the Puget Sound Legal Assistance Foundation. The case is assigned to Judge Burgess in Tacoma, see: *Herrera v. Pierce County, WA., et al.*, C95-5025FDB. ■

IN Prisoner and Guard Executed

On December 8, 1994, Gregory Resnover was executed by the state of Indiana. Governor Evan Bayh denied Resnover's request for clemency. Resnover was convicted and sentenced in 1984 for the 1980 killing of an Indianapolis police sergeant and in connection with the robbery and slaying of a Brinks security guard at a K-Mart. The last execution in Indiana was in 1985.

In retaliation for Resnover's execution, a prison guard named Phillip Curry was stabbed to death on December 13, 1994, at the Indiana State Prison in Michigan City. Prisoner Leonard McQuay was arrested in the guard's execution and sent to MCC Westville.

As one prisoner has stated: "This sort of pushes things to a whole new level in this state for the prison movement, primarily because such a move is unprecedented in this state and the political ramifications of such a retaliatory act is extreme. Resnover was a revolutionary political prisoner of war who had a political case. He was well liked and loved by

many prisoners." The prison at Michigan City was placed on lock down and all death row prisoners were moved to Westville.

Curry's death came after Charles Roche, a death row prisoner at Michigan City, fired 3 shots at a guard with a home-made .22 caliber pistol during an escape attempt with four other death row prisoners. For more information on events in Indiana contact: Indiana Committee Against SuperMax Abuse, P.O. Box 20670, Indianapolis, IN. 46220 (317) 475-1755.

Shortly after receiving the above information we received the following letter from McQuay. We have given him a free subscription to *PLN* and urge any of our readers who can be of assistance to help him as they can. His letter states: "Revolutionary Salutes, I'm writing to you to advise you that I was just charged with murder by the Laporte County of Indiana. This charge comes in light of the death of a prison guard at the Indiana State Prison. I am a New Afrikan revolu-

tionary that has been struggling throughout the department of corrections, waging struggles against colonial/neo-colonial oppression on every level. As you already know, the colonial state in Indiana just killed yet another New Afrikan revolutionary in the electric chair. My charge comes right after Gregory Resnover's execution. The state has waged its plot to kill all the ones who stand up in defense of their revolutionary integrity from the parasitic genocidal oppression.

"Could you please print a brief notice on these matters? I am seeking the support of the revolutionary national/international community. The Euro-arena will try to advance its measures of death in this case. I need help to prepare for my defense. Please let me know as soon as you can on this matter. I want the people to know that the racist colonial elite plan to kill me through a political lynching." Write: Leonard McQuay (AKA Khalfani Khaldun) #874304, P.O. Box 557, MCC, Westville, IN 46391-0057. ■

Death Penalty Challenged by Philadelphia Public Defenders

by Dale Gardner

Philadelphia's Public Defenders, Bar Association and Institutional Law Project Committee challenged the constitutionality of Pennsylvania's death penalty this October (1994), filing legal challenges in 78 murder cases including their clients.

The Defender Association of Philadelphia contends the law is "broadly drafted" and the state supreme court has "expansively interpreted" it, leaving more than 95 percent of murder defendants subject to a possible death sentence.

A 78 page petition to be filed with trial judges seeks to block the death penalty on the basis that the state law violates provisions in the U.S. and Pennsylvania constitutions prohibiting cruel and unusual punishment and requiring due process of law.

After surveying 449 murder cases awaiting trial in July of 1994, Assistant Defender David Zuckerman found that

86.9 percent had at least one "aggravating factor" that would allow the District Attorney's office to seek the death penalty. The DA's offices had filed a notice of intent to seek the death penalty in 94.2 percent of those cases.

While, if successful, the challenges would invalidate the statutory scheme underlying the death penalty statewide, the figures cited by the Defenders were gathered only in Philadelphia.

Bradley Bridge of the PA Bar Association's committee on capital punishment said the crux of the argument is that there is no way for the statute to be fairly enforced, and said that Philadelphia's experience was typical. Bridge said that under the statute as presently constituted, virtually any defendant may be deemed to have aggravating circumstances warranting capital prosecution. The Defender's office said in their brief, "The combination of these factors has resulted in a statute that exposes over 95

percent of those charged with murder to the death penalty." There is no longer a legal distinction between those murder defendants who receive the death sentence and those who don't, the Defender's office said.

Philadelphia District Attorney, Lynne M. Abraham, said the law requires prosecutors to give defense lawyers early notice of intent to seek the death penalty, but the office ultimately seeks it in only some of the cases.

Zuckerman said, "Our study is not an indictment of the charging practices of the Philadelphia District Attorney. It's an indictment of the statute, which doesn't do what it was designed to do: narrow the class of persons subject to the death penalty." ■



Purdy Medical Suit Settled

In the April, 1994, issue of *PLN* we reported *Hallet v. Payne*, No. 93-5496(T)D, the class action suit by women prisoners in federal court in Tacoma against prison officials at the Washington Corrections Center for Women, also known as Purdy. The suit alleged that medical care for prisoners at Purdy was inadequate to meet the prisoners' serious medical needs. These contentions were reinforced and indeed proven by the death of Gertrude Barrow in May, 1994, [See *PLN*, Vol. 5, No. 7 and 10]. Barrow died due to the willful neglect of her captors who failed to provide her with adequate medical care.

The settlement agreement was signed on November 28, 1994, and affects all prisoners at Purdy. Among the DOC's obligations are to develop, adopt and implement a set of health care standards consistent with the Washington State Department of Health Standards. The standards will comply with previous court orders entered in the case and will consider four sets of National Standards that have been used to govern prison health care in the U.S. These are those of the American Correctional Association (ACA), American Public Health Commission (APHA), Joint Commission on Accreditation of Health Care Organizations (JCAHO) and the National Commission of Correctional Health Care (NCCHC). The deadline to develop the policies is September 1, 1995, and they must be fully implemented by April 1, 1996. By no later than December 1, 1994, the DOC must develop a health care services delivery plan for WCCW prisoners. This plan must specify the implementation and completion dates of all tasks in the plan.

By April, 1995, WCCW shall install and begin using a DOC medical services database. The database will contain information on: details of medical care encounters, services provided such as provider name, date of service, primary diagnosis, treatment, referrals for lab, X-ray, appointments with specialists, medication prescribed and other follow up actions; scheduling of medical care appointments and follow ups as well as referrals for diagnostic tests, specialty care, etc.; medical care provided off site in the community, including hospitalizations and referrals to community specialists. A dental services and mental health services database will track comparable information in those areas.

Health care records must be legible and contain the necessary signatures in accordance with professional standards. The DOC will date and time all health record entries. At a minimum WCCW health care records will include: records of written and oral requests for health care; identifying information such as the patient's name, DOC number, etc.; treatment plan; problem list which will include the receiving screening health assessment, all findings, diagnoses, treatment and dispositions; medications prescribed and their use; reports of lab, x-ray and diagnostic studies; progress notes; consent and refusal forms; release of information forms; results of consultations and off site referrals for treatment; discharge summary of hospitalizations; special needs treatment plan, if any; immunization records; date, time and place of each medical encounter and the signature and title of each documenter. The DOC must ensure that all records are complete and completed in a timely manner. Pharmaceutical records must be kept with patient records.

By no later than November 1, 1994, the DOC should have implemented a system to track the dispensing and administra-

tion of medications. The standards governing this area must be consistent with correctional health care standards. WCCW will institute a self medication program defining the circumstances under which prisoners may carry and administer their own medication. The DOC agreed to comply with all applicable state and federal laws and regulations and their own policies regarding the prescription, dispensing, administering and procuring of pharmaceuticals.

The DOC agreed to provide adequate staffing of qualified health care providers at WCCW. By October 1, 1994, the DOC was to come up with a plan to ensure that WCCW prisoners were provided with necessary follow up health care. The system must ensure that prisoners are provided access to the results of any medical tests or assessments performed as soon as the results of the medical tests are known. Medical tests and assessments done at WCCW or off site must be obtained, and follow up care done, in a timely manner. The decree requires the DOC, together with an independent monitor and consultants, to randomly review the health care records of WCCW prisoners to determine if all necessary and recommended tests, assessments and treatment were performed. The independent monitor must be one mutually agreed upon by the parties. If the parties can't agree on a monitor one shall be appointed by the court. The DOC will pay the monitor's expenses.

The DOC will ensure that physician's orders are signed and mid-level provider's orders are reviewed and signed in a timely manner complying with professional standards and state law. The DOC must also develop a protocol to coordinate prisoner health care among multiple providers to ensure continuity of care. The DOC must provide a written, problem oriented individual health care plan, with necessary follow up, for all WCCW prisoners with high risk medical conditions such as asthma, AIDS/HIV, diabetes, seizure disorders, ulcers, gynecological problems, etc. The defendants must also prepare a plan to provide routine gynecological care for all WCCW prisoners, including PAP smears and mammograms.

The defendants must train their medical staff to "ensure that they maintain a professional attitude at all times while providing health care services and that staff treat prisoners as individuals with consideration of their privacy, dignity and feelings."

By October 1, 1994, the DOC was required to develop a Continuous Quality Improvement program (CQI) that will monitor the quality of health care services at WCCW. The program will monitor all major aspects of health care including: access to health care, nursing services, physician services, mental health services, pharmacy services, dental services, environmental services, infectious control procedures, health care records, sick call services, admission screening and evaluations, chronic disease services, infirmary care, diagnostic services and all adverse patient occurrences including all deaths. The DOC must establish a multi disciplinary committee that involves the use of qualified health care professionals with the appropriate specialties and includes persons not regularly employed by the DOC. The committee must perform at least quarterly reviews and identify staff training needs and deficiencies as well as any deficiencies in the services provided to prisoners. It will also prepare corrective plans to address all recommended improvements and then assess the effectiveness of corrective action. The independent monitor will review all reports and findings made by the CQI and determine if the CQI process is working effectively.

Purdy Settlement (continued)

The DOC must employ a qualified health care manager responsible for the administration of health care services. The manager will be responsible for arranging all levels of health care and ensuring the quality and accessibility of all health services provided to WCCW prisoners. All medical judgments must be made by a licensed physician or qualified health care provider under a physician's supervision. The DOC must also employ a licensed physician as medical director for the prison. In addition to providing timely care the medical director will supervise all health care judgments regarding health care provided to WCCW prisoners.

WCCW prisoners will receive mental health services comparable to those given to male prisoners. The DOC will employ sufficient qualified mental health staff to provide prisoners with adequate evaluation and treatment at least five business days a week with emergency coverage for other periods, consistent with professional standards of care.

The DOC also agreed to develop a policy which would allow prisoners to obtain their own health care at their own expense or through private insurance coverage, provided that prisoners using such care bear the cost of security, transportation and from personal providers and all other related expenses. Interpreters must be provided to prisoners seeking health care who do not understand English and illiterate prisoners must be given oral information. Special diets must be given to prisoners with medical need for such. Prisoners will not be housed in housing units designated especially for housing mentally ill prisoners for reasons other than those related to mental health.

The consent decree gives the federal court continuing jurisdiction over the case for four years after it is entered by the court. The defendants can motion to end the court's jurisdiction before that period if they can show by a preponderance of the evidence that they have complied with the decree's terms. The plaintiffs can motion to extend the court's jurisdiction over the case if they can show that the decree has not been complied with. The decree does not resolve the plaintiff's claims for money damages nor the use of restraints and seclusion.

Among the changes already made at Purdy are that the on call physician who was on duty when Barrow died has re-

signed. A doctor who burned a mole off a prisoner's thigh with a paper clip no longer works at Purdy (perhaps he was transferred to another prison?). Given the overall abysmal state of prison health care across the country it remains to be seen if the decree will have the desired effect of improving health care services for WCCW prisoners. The prisoners were represented by Patricia Arthur at Evergreen Legal Services, Katrin Frank, cooperating attorney with the Northwest Women's Law Center and Megan McLemore, cooperating attorney with the ACLU. ■

Mumia Speaks

Mumia Abu Jamal is the former Black Panther unjustly convicted of killing a cop in Philadelphia. A journalist and outspoken advocate for the oppressed before and after his conviction, Mumia was sentenced to death. Since he has been on death row he has continued his incisive and insightful criticism and commentary of the criminal justice system and American condition in general. Mumia is a *PLN* reader and over the years has contributed articles to our pages. We recently reported that National Public Radio had dropped Mumia from its *All Things Considered* radio program after it had contracted to air his commentaries on the radio.

Now people don't have to wait on the corporate media to hear Mumia. He publishes a tabloid paper called *The Jamal Journal: From Death Row This is Mumia Abu Jamal*. The 20 page paper has articles by Mumia, about his case and updates on his situation as well as other political prisoners in the United States. Subscriptions aren't available but \$3.00 will get you the latest issue. For copies or more information write: Jamal Journal, P.O. Box 19709, Philadelphia, PA. 19143. (215) 476-8812.

For those desiring more information and a clearer view of Mumia's life, struggle on behalf of the oppressed and the political context of his frame up and state sanctioned murder, C. Clark Kissinger has published his interview of Mumia in booklet format. Titled *Mumia Abu-Jamal: A Life of Resistance*, the interviews took place on death row in Pennsylvania in 1994. The interview was originally published in the *Revolutionary Worker*. Mumia notes the irony that he won't be able to read the interview because the *RW* has been banned in Pennsylvania prisons since 1987. Copies of the booklet are available for \$1.00 from: Revolution Books, 13 E. 16th St. New York, NY. 10013. ■

S. Ct. To Hear Quayle Retaliation Claim

On January 20, 1995, the US Supreme Court announced that it had granted certiorari to hear a prison retaliation case and it may have an interesting effect on the 1996 presidential campaign if Dan Quayle, George Bush's former vice-president, changes his mind and decides to run for the presidency.

Brett Kimberlin is a federal prisoner serving time on drug and weapons charges. Prior to the 1988 presidential election he was scheduled to give a press conference, in prison, alleging that he had sold drugs to Dan Quayle while both attended college. On three occasions, just prior to press conferences being held, Kimberlin was placed in segregation and prevented from talking to the media. He filed suit claiming that his segregation was an effort by the Bureau of Prisons to silence him. The district court agreed, see *Kimberlin v. Quinlan*, 774 F. Supp 1 (DC DC, 1991), denied the government's motion for summary judgment and scheduled the case for trial.

The government appealed and the court of appeals for the District of Columbia Circuit reversed, dismissing the case at 6 F.3d 789 (See *PLN*, Vol. 5, No. 3). The appeals court claimed that Kimberlin had presented only "weak" circumstantial evidence of retaliation and he was not entitled to conduct discovery in the matter. Both the majority and dissenting rulings emphasized their discontent with the legal standards applied solely in the District of Columbia circuit in suits against government officials. Kimberlin appealed and the Supreme Court has granted certiorari.

The issues to be decided by the court are "(1) Must plaintiffs in *Bivens* cases in which unlawful motive is element of alleged offense satisfy 'heightened pleading standard' to survive motion to dismiss or for summary judgment based on assertion of qualified immunity? (2) Must plaintiffs in *Bivens* cases produce, prior to discovery, 'direct,' as opposed to persuasive circumstantial evidence of unlawful motive?"

PLN will report the ruling once it is issued. See *Kimberlin v. Quinlan*, docket number 93-2068. ■

Population PI Vacated

Prisoners at the North Carolina DOC Morrison Youth Institution (MYI) filed a class action suit claiming that overcrowding and under staffing at the prison exposed them to constitutionally unacceptable risks of physical violence. They sought a preliminary injunction (PI) which was granted. The district court ordered prison officials to reduce the prison's population by 30% in two months to a total of 205 prisoners in single cells and limited the number of prisoners to be held in dormitories, to create and staff new guard posts in the prison and cease using dorms to house segregation prisoners. The court of appeals for the fourth circuit immediately stayed the order and then vacated the preliminary injunction.

The appeals court gave an extensive discussion of the role federal courts play in prison reform litigation by state prisoners. "Even where there has been a finding on the merits that unconstitutional conditions exist, federal courts should proceed cautiously and incrementally in ordering remediation so as not to assume the role of prison administrators." Essentially, federal

courts should issue injunctions in the details of prison management only when prison officials have been given an opportunity to correct the constitutional violations and fail to do so. Injunctive relief was inappropriate in this case because it had not been tried on the merits yet and because prison officials had not been given any opportunity to resolve the constitutional problems and deprived them of all discretion to do so. Thus, the lower court, "exceeded the limited remedial authority vested in the federal courts to direct the way in which state prison officials meet the dictates of the Eighth Amendment."

The lower court was chastised for imposing the standards of the American Correctional Association (ACA) with regards to the amount of living space each prisoner must be given. Thus "effectively and impermissibly elevating to constitutional status mere standards from the American Correctional Association." Standards and guidelines of groups such as the ACA simply do not establish con-

stitutional minima and cannot be relied on by courts to do so.

Reviewing the facts in the case, the appeals court held that prisoners had not shown they were exposed to a constitutionally unacceptable risk of violence. This was based on two factors, first, there was no body count in the preceding 4 years at MYI, all the violence involved fist fights and such rather than stabbings; second, prison officials testified that violence at MYI was "within acceptable limits." There was also evidence that prison officials had made attempts to address violence within the prison by assigning staff to monitor violence; temporarily reassigned staff from other prisons to MYI, improved the physical plant; initiated group counseling for stress and anger management and more. The appeals court held that these constituted a good faith attempt by prison officials to address the unconstitutional prison conditions, many of which alleviated the problems complained about. See: *Taylor v. Freeman*, 34 F.3d 266 (4th Cir. 1994).■

\$50,000 Awarded in Groin Kneeing

Fred Culver is a mentally disabled alcoholic. He was arrested by city police in Sparta, Georgia and taken into custody. Once in the jail he began slapping at one of the policemen. In an ensuing melee Culver was twice kned in the groin. He was released from the jail the next day and sought medical assistance for swollen testicles. He subsequently underwent scrotal surgery to correct testicular swelling and bleeding. He filed suit pursuant to 42 U.S.C. § 1983 against the two policemen involved in the assault and the city of Sparta.

After a bench trial the court ruled in Culver's favor concluding that the attack violated Culver's eighth amendment right to remain free from cruel and unusual punishment. [Editor's Note: The court's reliance on the eighth amendment is technically misplaced. The eighth amendment applies only to convicted prisoners, not to pretrial detainees or, as in this case, arrested citizens. Their right

to remain free from state violence emanates from the fourth, fifth and fourteenth amendments.] The court held that Culver had met his burden of proof showing that both the objective and subjective components of his eighth amendment claim had been met.

The objective component was satisfied by the fact that the policeman had ignored his training "and chose to adopt a method of control that is both barbaric and cruel, particularly when applied to a mentally retarded and inebriated individual. The use of force by Fowler was of the sort 'repugnant to the conscience of mankind.'"

The subjective component was that there was a need for force to be applied but that the force actually used, i.e. the kneeling to the groin, was far in excess of that warranted by the circumstances given the fact that Culver was inebriated, of medium size and mentally retarded. Moreover, the force applied was not a last ditch effort to subdue Culver but was an initial response.

Fowler did not attempt to control Culver in a more accepted or humane manner of restraint

Based on this finding the court awarded Culver \$25,000 in compensatory damages and \$25,000 in punitive damages against the policeman who kned him in the groin. The court awarded \$6,012.73 to reimburse Culver's medical expenses arising from the injuries indicted. The court awarded punitive damages because Fowler acted with malicious intent to harm Culver. "Kneeing a prisoner in the groin is a barbaric and cruel means of control. Despite a variety of approved prisoner control techniques available to Fowler, he chose to use a method of control that maximizes pain and subjects the prisoner to a high risk of injury. The situation simply did not warrant the use of this type of force." See: *Culver By and Through Bell v. Fowler*, 862 F. Supp.369 (MD GA 1994).■

\$ 157,000 Awarded in Retaliation Suit

Jory Lowrance is a Muslim New York state prisoner. In a seven year period he was transferred a total of 17 times to different state prisons. He filed suit under 42 U.S.C. § 1983 claiming that the transfers were in retaliation for his having exercised his rights of free speech, the right to petition the government for redress of grievances and access to the courts, free exercise of religion and the right to be free from cruel and unusual punishment. The retaliation consisted of the transfers, being placed in segregation, having his cell searched and being denied medical care for an injured knee. After an eight day bench trial the court ruled in favor of Lowrance, finding that he had indeed been retaliated against and persecuted by the New York DOC for exercising his constitutional rights. The court awarded a total of \$157,000 in damages. This ruling is the trial courts findings of fact and conclusions of law resulting from the trial. It is an excellent ruling for anyone litigating a prison retaliation claim.

At the outset the court noted that it did not decide whether a policy of frequently transferring a prisoner that prison officials perceive to be a "troublemaker" in order to lessen his influence on other prisoners in and of itself constitutes a constitutional violation. Instead, the focus in this case was whether the constitutional violation occurs when the motivation behind the frequent transfers is to retaliate against the exercise of constitutional rights, the court held it did. As a separate matter the court also found that Lowrance had been deprived of his right to adequate medical care. The court held that he was entitled to injunctive relief in the form of expunging misbehavior reports that were retaliatory and a new parole hearing based on records containing accurate information.

The court held that the defendants were not entitled to qualified immunity because prisoners' right to remain free from retaliatory action for having exercised their protected rights was established as far back as 1976, citing *Jones v. Coughlin*, 696 F. Supp. 916 (SD NY 1976) and *Meriwether v. Coughlin*, 879 F.2d 1037 (2nd Cir.1989). Retaliatory segregated confinement had been held unlawful in the second circuit as far back as 1979 in *Hohman v. Hogan*, 597 F.2d 490 (2nd Cir. 1979). Likewise, prison-

ers have had a right to adequate treatment of their medical problems as far back as 1976 when the supreme court decided *Estelle v. Gamble*, 429 US 97, 97 S Ct. 285 (1976). Prisoners also have a well established right to accurate information in their prison files when such information is relied upon for parole determinations. See: *Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979) and *Farinaro v Coughlin*, 642 F. Supp. 276 (SD NY 1986). Because the rights violated were so well established the court denied the defendants qualified immunity for their illegal actions which meant they were liable in money damages.

Before and during the trial the Attorney General's office appeared for and purported to represent all of the defendants found liable. After the trial was over the Attorney General's office claimed that it had not been authorized to appear on behalf of certain defendants. The court held that because the trial had closed and the state had already agreed to indemnify the defendants the state was liable for the damages. After years of litigation where the Attorney General's office had claimed to represent the defendants and defended the action the court held they were equitably estopped from denying that they had appeared on behalf of the defendants. The result of the other option available, a new trial, would only add to the plaintiff's attorney fee award.

While noting that prisoners have no legal right to remain in one prison or avoid transfers to other prisons, they have a well established right not to be transferred from one prison to another in retaliation for having exercised constitutional rights such as complaining of prison conditions, suing prison officials, practicing their religion, etc. Likewise, they cannot be placed in segregation for exercising those protected rights. The court cited numerous cases on these issues. In discussing which party bore the burden of proof the court adopted *Mount Healthy City Board of Education v. Doyle*, 429 US 274, 97 S Ct.568 (1977) which established the applicable standards in claims involving government retaliation against citizens who exercise their constitutional rights. The initial burden is upon the plaintiff to show that their conduct was constitutionally protected and that the conduct was a "substantial

factor," or a motivating factor, in the decision made against the plaintiff. Once the plaintiff has met that burden the court must determine whether the defendant has shown by a preponderance of the evidence that they would have reached the same decision even in the absence of the protected conduct. This is also known as the "but for" standard and has been adopted for prison retaliation cases. See: *Sher v. Coughlin*, 739 F.2d 77 (2nd Cir. 1984).

The court made numerous findings of fact holding that Lowrance had indeed been retaliated against for having exercised his constitutionally protected rights. The rights exercised consisted of suing prison officials on his behalf and that of other prisoners, filing administrative grievances and having a leadership role in the Muslim community. On several occasions he was transferred to different prisons shortly after filing grievances or complaints. The transfers often prevented him from filing or pursuing grievances and lawsuits "In many instances, prison personnel sought to transfer plaintiff within only days or weeks of his arrival at the prison based on plaintiff's reputation at preceding facilities and speculation that plaintiff would engage in legal or religious activities. In some cases prison officials relied on dismissed or expunged misbehavior reports as justification for transferring plaintiff. At trial, defendants continued to rely on these nullified reports. Were one to physically expunge plaintiff's prison records of all the dismissed or expunged misbehavior reports, his record of documented disturbances would be thin or nonexistent."

The court made findings of liability against New York DOC Commissioner Coughlin and numerous prison wardens holding that they had sufficient notice that the transfers and segregation were retaliatory yet chose to do nothing about them. The court made extensive findings of fact with regards to each individual transfer and found most, but not all, to be retaliatory in nature.

Addressing the medical indifference claim, the court held that prison officials had actual notice that Lawrence's knee was injured and required medical treatment and would worsen if not treated yet failed to treat it. In part, the failure to treat it was due to the numerous transfers which prevented continuity of care. This resulted in failing to provide required sur-

Award (continued)

gery for nearly two years after it was first recommended. The negative effects of this lengthy delay were further compounded by the fact that he was deprived of adequate post-operative treatment by not receiving needed physical therapy.

Addressing the issue of accurate information in Lowrance's prison files, the court concluded that there was significant false information in his files and that it had been relied upon in a constitutionally significant way. "To the extent inaccuracies in his records were relied on in decisions relating to his transfers and classification in maximum security, plaintiff has a claim insofar as these decisions had collateral consequences for his parole." To state a claim the error in the files must not be technical, it must be about the prisoner's prior criminal or prison disciplinary record. "Additionally, as a jurisdictional prerequisite to filing an action to enforce this right under 42 U.S.C. § 1983, the prisoner must allege that he requested that the information be expunged and that prison officials refused." Lowrance met his burden of proof by showing he had requested that the flawed misconduct reports be expunged but prison officials refused and "certain flawed reports continued to be relied on as the basis for transfers, placement in segregated confinement, and classification in maximum security. We find it likely that each of these administrative decisions had collateral consequences on the timing of his eligibility for parole. We conclude that he is entitled to a new parole hearing based on accurate information, unless this issue is mooted by plaintiff's release on parole subsequent to this trial."

The court awarded Lowrance \$132,000 in compensatory damages and \$25,000 in punitive damages. The court gave a detailed breakdown of how much money was awarded in damages for each constitutional violation. With regards to the punitive damage awards the court stated: "We believe that the protracted time during which plaintiff was subjected to impermissible treatment in violation of his constitutional rights and the nature of such mistreatment also warrant an award of punitive damages. The actions taken with regard to plaintiff reflect both an improper motive and intent and a reckless or callous indifference to federally protected rights. At the same time, we

recognize that we are reviewing the cumulative effect of many episodes, some of which standing alone would not warrant an award of punitive damages. Also, we believe that the responsibility for the totality of plaintiff's treatment rests most heavily with the higher echelon DOCS officials. Accordingly, we grant punitive damages in the sum of \$25,000 against Commissioner Coughlin, as well as present and former Superintendents Henderson, Smith, Scully, Jones, Sullivan, and Hoke (or the state on their behalf), jointly and severally." In essence, the taxpayers got to pay for the illegal actions of the DOCS employees. See: *Lowrance v. Coughlin*, 862 F.Supp. 1090 (SD NY 1994). ■

Death Penalty Sought for Kurdish Legislators

On August 3, 1994, the trial of eight Turkish Members of Parliament (MP) began in a special state security court in Ankara. Seven of the legislators are members of the now banned Democratic Party, one is an independent. They are charged with capital treason. Prosecutors claim that the eight MP's worked politically to further the cause of Kurdish Worker's Party (PKK), a communist party which has been waging an armed struggle since 1984 to establish an independent Kurdistan.

After months of trial the case was adjourned on December 8, 1994, to await a verdict. One of the MP's lawyers, Yusuf Alatas, stated that the prosecution had rested on its claims that the defendants were guilty of separatism and was seeking the death penalty. Alatas said the defendants decided not to produce a defense against the charges after their motions for evidence were denied. "They believe a defense will make no difference to the outcome," he said.

None of the MP's are charged with any acts of violence. The basis of the charges, according to Turkish prosecutor Talat Salk is: "Their aim is to form a Kurdish state by taking land from the government." The legislators were stripped of their parliamentary immunity in March, 1994, and their respective political parties were banned. For more information on the PKK and the struggle for an independent Kurdistan, contact: Kurdistan Report, 11 Portland Gardens, P.O. Box 1922, London, N4 1DL, England. ■

Most Murders by Friends and Family

One of the propaganda lies hyping the anti crime hysteria is the fear of seemingly random crimes committed by strangers against strangers. Anyone who watches the television news or reads newspapers would conclude that such crimes constitute the majority of murders committed. However, according to government statistics, that is not the case.

The Department of Justice released its report *Murder in Families*, July, 1994. The study consisted of findings drawn from a representative sample survey of state and county prosecutors' records. The survey covered disposed charges against nearly 10,000 murder defendants accounting for over 8,000 murder victims in 1988. The study's findings are that murder victims usually know their killer and that parents are the leading killers of children.

The study revealed that 16% of murder victims were members of the defendant's family. 64% were killed by friends or acquaintances while only 20% were killed by strangers. 57% of all murdered children under the age of 12 were killed by their parents. 11 % of all victims over 60 were killed by their children. 45% of family murder victims were female compared to only 18% of non-family murder victims. Among black marital partners women are just as likely to kill their spouse, among whites, women killed their partners only 38% of the time as opposed to the men killing their partner 62% of the time.

It was not surprising that 74% of all murder defendants had a prior criminal record, but 44% of the victims also had a criminal history indicating that perhaps a significant portion of murders involves the "criminal element" settling scores or differences amongst themselves rather than preying on hapless bystanders. An interesting note is that 19% of family murder victims had a criminal record as did 56% of family murder defendants. The survey showed that convicted family murder defendants tended to receive slightly more lenient punishments than did non-family murderers. The study gives extensive details, graphs, charts and other information. It is available free from: BJS Clearinghouse, P.O. Box 179, Dept. BJS-236, Annapolis Junction, MD. 20701-0179. ■

State Prisons Subject to RA & ADA

Anthony Torcasio is an extremely obese Virginia state prisoner who is 5' 7" tall, weighs over 460 pounds and has a girth of 78". He filed suit under 42 U.S.C. § 1983 claiming that his obesity is a disability that limits his walking range, gives him back pain, makes him unable to climb stairs, bend over, stand or lay down for prolonged periods of time and makes him vulnerable to body imbalances. The essence of his suit is that prison facilities simply cannot accommodate him due to his size, this ranges from cell doors, toilets, dining halls, pod tables, and outside recreational activities. Torcasio alleged that these conditions violated the Rehabilitation Act of 1973 (RA) 29 U.S.C. § 794, the Americans with Disabilities Act (ADA) 42 U.S.C. § 12132 and the eighth and fourteenth amendments of the US Constitution.

The defendant DOC officials moved for summary judgment on various grounds, which the court granted and denied in part. Because Torcasio had been released on parole while the suit was pending the court dismissed the claims for injunctive relief as being moot.

The state claimed that the RA does not apply to state prisoners. The court noted that section 504 of the RA prohibits a federally funded state program from discriminating against an individual solely on the basis of an individual's handicap. "Both the stated goals and plain language of the Act indicate that state prisons may be subject to the provisions of the Rehabilitation Act." The defendants then claimed that even if the RA did apply to state prisons Torcasio's complaint was insufficient as a matter of law because it did not assert that the Virginia prison system received federal funds. The court held this omission was cured when he asserted the receipt of federal funds in his response to the defendant's answer.

The defendants also claimed that the ADA does not apply to state prisons. To state a claim under the ADA a plaintiff must be a qualified individual with a disability who by reason of that disability was discriminated against or denied the benefits of the services, programs or activities by a public entity. The court held that the Virginia DOC is a "public entity" under the ADA and is subject to its provisions. *Noland v. Wheatley*, 835 F. Supp. 476 (ND IN 1993) has held that the ADA

applies to state prison facilities. Moreover, "...the Architectural and Transportation Barriers Compliance Board has promulgated a series of interim final rules pursuant to Title II of the ADA setting accessibility guidelines for state and local correctional facilities. 59 Fed.Reg. 31676, 31699-711 (June 20, 1994)."

Addressing Torcasio's constitutional claims, the court held that the only valid eighth amendment claim asserted was that his toilet was too small and due to his weight his groin and genitals were submerged in the toilet bowl whenever he sat on the toilet. The remaining claims were dismissed as far as an eighth amendment violation was concerned. Readers will note that the constitutional and statutory claims are separate. In other words, just because a condition complies with the eighth amendment does not mean it complies with either the RA or the ADA.

The court denied the defendant's motion for summary judgment on the ADA claims because a jury could rule that the DOC had not complied with its provisions of making its prisons accessible to the disabled. Virtually all of the plaintiff's claims were set for trial on the issue of whether the ADA was violated. "In effectuating the policy of making facilities and programs readily accessible to individuals with disabilities, defendants are required to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, activity or program." "Whether a defendant has made a reasonable accommodation to an individual with a disability is ordinarily a question of fact." "Summary judgment may be awarded only when there is no dispute about the nature of the accommodation made and where no reasonable juror could determine the accommodations made were unreasonable."

Because the level of accommodation that must be provided to morbidly obese prisoners is unclear the court granted the defendants qualified immunity from money damages on some of the claims and denied it as to others. The case was set for trial on the issues that were not dismissed. See: *Torcasio v. Murray*, 862 F. Supp. 1482 (ED VA. 1994). ■

9th Cir. Clarifies Mailbox Rule

The Federal Rules of Civil Procedure and Appeals set forth numerous time limits by which motions and other documents must be filed, answered, etc. This has led to a large body of case law concerning how prisoners comply with these time limits due to the difficulties associated with litigating from within prison, namely, having to rely on prison officials to forward their legal mail to the post office in a timely manner. In *Houston v. Lack*, 487 US 266, 108 S.Ct. 2379 (1988) the supreme court held that a *pro se* prisoner's "notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk."

Since then various appeals courts have expanded this rule to include bankruptcy petitions, motions, discovery replies, etc. and the rulings have dealt with the means by which prisoners actually mailed the documents at issue, i.e. through legal mail systems that logged the mail, certified mail, etc. Under the Federal Rules of Appellate Procedure (FRAP) litigants have thirty days from the time of the lower court ruling within which to file their notice of appeal, this time limit is mandatory and jurisdictional. Mark Koch is an Arizona state prisoner who sought to appeal an adverse district court ruling. His notice of appeal did not arrive at the court until well after the 30 day limit had passed. After a remand from the appeals court, the lower court held that the appeal was not timely filed, the court of appeals for the ninth circuit affirmed.

Koch claimed that he gave his notice of appeal to a prison guard collecting regular mail three days before the last day for filing the notice. He chose not to use registered, insured, or certified mail, which are logged by prison officials but which also involve additional postage fees. The appeal notice arrived in the district court nine days after the deadline.

In *Miller v. Sumner*, 921 F.2d 202 (9th Cir. 1990) the court had held that dropping an appeal notice into a prison mailbox does not satisfy the requirements in *Houston*. "For the exception to filing

Mailbox (continued)

requirements for *pro se* prison appeals to apply, the prisoner must deliver the notice to prison authorities in a timely fashion for mailing so that the authorities may post it through the prison log system. This is the only way to avoid uncertainty and chicanery." The court noted it had always held materials to be timely filed if they arrived in court slightly past the deadline which indicated they were mailed within the deadline. See: *Sudduth v. Arizona Attorney General*, 921 F.2d 206 (9th Cir. 1990).

Analyzing the rationale behind *Houston* the appeals court held that while prisoners cannot personally deliver their legal papers to court clerks for filing, courts may "demand that he take reasonable steps to prove the relevant date—when the notice of appeal left his control." The court held that when a prisoner mails his legal filings in a manner which can be expected to create documentary evidence of when it was mailed (i.e. mail logs, date stamp, etc.) or actually creates indisputable circumstantial evidence that the papers left his control on a date prior to the expiration period for appeal (i.e. receipt the day after it was due by the court) the material is deemed filed on the date established. "However if a prisoner just sends the notice on its way without providing some reliable evidence of the date on which he relinquished control he bears the risk of delay just like any other party. A prisoner may be required to take special steps to obtain special relief from the filing deadlines and he forgoes that relief by mailing by ordinary methods. Any other rule would render the filing deadlines so uncertain adjudication would be impossible."

The court noted that Koch is an experienced litigant who was aware of the manner in which legal mail is sent out of prison yet he did not use the approved legal mail system in place which would have logged the date of receipt. "It might have been a different case if he had attempted to document the date but was denied." Of course readers can easily avoid this type of problem by immediately filing notices of appeal and similar documents as soon as possible rather than procrastinating until the last minute. See: *Koch v. Ricketts*, 38 F.3d 455 (9th Cir. 1994). ■

VA Parole and Good Time Laws Don't Create Liberty Interest

Orillion James is a Virginia state prisoner who filed suit seeking money damages and an injunction ordering prison officials to expunge his records of false educational information that hindered his ability to be paroled. The records in question claim that James can only read at a fifth grade level and does not have a GED. Despite several requests, the defendants refused to expunge the erroneous information. James contends that the erroneous information has resulted in his security level being increased which results in a likelihood he will be denied parole.

The court noted that in *Paine v. Baker*, 595 F.2d 197 (4th Cir 1979) it was held that prisoners could challenge the accuracy of information in their prison files if the information was "constitutionally significant," i.e. it would affect their release from prison by being relied on to deny parole or statutory good time credits. "The entire premise for the *Paine* dictum was that an inmate had a liberty interest in parole and good time credits that was protected by the due process clause of the fourteenth amendment."

Analyzing Virginia parole statute, Va Code § 53.1-155, the court held "The Virginia statute, far from creating 'a presumption that release will be granted,' . . . absolutely prohibits parole unless the Parole Board decides otherwise. Because the Parole Board has such unfettered discretion, the statute creates no protected liberty interest." "Neither the parole statute nor any parole regulation has created a liberty interest in parole sufficient to invoke the due process clause."

Analyzing Va. Code § 53.1-199, the Good Conduct Allowance (GCA) statute, the court held that Virginia prisoners have no due process liberty interest in earning GCAs. "Accordingly, inmates may not invoke § 1983 as a basis to attack the validity of materials considered in determining whether they should be released on parole or assigned to any particular GCA level. Thus, even under the three-part test in *Paine*, plaintiff has failed to state a cause of action because he cannot show that the allegedly false information 'is relied on to a constitutionally significant degree.'" ■

The court stated that while Virginia prisoners cannot use 42 U.S.C. § 1983 to challenge erroneous material in their prison files, they can avail themselves of the Inmate Grievance Procedure to challenge material. "Moreover, in those rare instances where admittedly false material is intentionally used to inhibit parole or awards of GCA, federal jurisdiction might be asserted to prevent arbitrary and capricious action." See: *James v. Robinson*, 863 F. Supp. 275 (ED VA. 1994). ■

Retaliatory Infraction Illegal

Donald Dixon is a Missouri state prisoner. He filed suit under 42 U.S.C. § 1983 after a prison guard filed a retaliatory disciplinary charge against him after he filed a grievance. The district court granted summary judgment in favor of the guard because the disciplinary hearings committee dismissed the infraction and Dixon was not punished. The court held that Dixon could not establish his retaliation claim without showing independent injury. The court of appeals for the eighth circuit reversed and remanded in a brief opinion.

"In *Sprouse v. Babcock*, 870 F.2d 450 (8th Cir. 1989), we recognized the First Amendment right to petition for redress of grievances includes redress under established prison grievance procedures.... Although the filing of a false disciplinary charge is not itself actionable under § 1983, the filing of a disciplinary charge becomes actionable if done in retaliation for the inmate's filing of a grievance..., see: *Franco v. Kelly*, 854 F.2d 584, 589-90 (2nd Cir. 1988). Having presented evidence that Brown's disciplinary charge was false and made in retaliation for Dixon's grievance against Brown, Dixon need not show a separate, independent injury as an element of his case. Because the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself.... In short, when retaliatory conduct is involved, there is no independent injury requirement." See *Dixon v. Brown*, 38 F.3d 379 (8th Cir. 1994). ■

CA Legislative Horror Show

by Dan Pens

Due to our very long lead time (I write this on March 7th) it's difficult to report on fast moving stories like the goings on in the state house. As you read this, who knows what may have happened since this story was written. But that said, here is "the latest" from the California Legislative Horror Show.

AB 411, introduced by assembly member Bordonaro, would greatly reduce the number of prisoners eligible to participate in the family (trailer) visiting program. Those convicted of crimes relating to murder, manslaughter, sex offenses, or anybody doing life without parole would be prohibited from having trailer visits.

Not to be outdone by the state assembly, James Gomez, Director of the CA Dept. of Corrections (CDC) filed an application for "emergency" regulatory changes to the California Code of Regulations which would prohibit family (trailer) visits for any prisoners convicted of murder; with a life top; manslaughter or attempted murder of a family member; specified sex offenses; in close custody, ad seg, SHU, a reception center or on death row; convicted of narcotics trafficking, in prison or out; or who has received a disciplinary charge within the past year.

Gomez is applying for emergency regulations pursuant to CA Penal Code §5058(e). At the California Senate Judiciary Committee hearing on the bill that became Penal Code §5058(e), representatives for the prison system told the committee members that the procedure would only be used in case of rioting or general insurrection. Not surprisingly, they lied.

In *Pro Family Advocates v CDC*, a Marin County superior court issued injunctive relief prohibiting the CDC from enforcing family visiting restrictions contained in last year's state budget. The CDC appealed and lost. Now they are attempting to undo the court's order (and then some) through the regulatory process.

Curiously, a similar scenario was played out in Washington state this January and February. The legislature proposed bills that would restrict trailer visits, and the DOC responded by issuing an emergency Division of Prisons directive that is in many ways more restrictive than the proposed legislation!

California AB 411, in addition to the trailer visit restrictions, would require prisoners be charged a \$3.00 fee to marry, make a will, or create a power of appointment.

Not to be outdone by the state assembly or the CDC, a CA senate bill (SB 470) was introduced two days after Gomez filed for his emergency regulatory changes. SB 470 would abolish all family trailer visits—period. It also states that prisoners would be henceforth prohibited from: (a) Possessing or using tobacco products, (b) Using weights or weight lifting equipment, (c) Participating in contact sports as a part of recreational activity and (d) Viewing any television program that contains violence or sex, as determined by the Director of Corrections.

SB 470 also prohibits the CDC from selling "coffee, candy, tobacco products, or other commodities not deemed essential to an inmate's health and well being..." SB 470 also states that "the CDC shall require of every able-bodied prisoner [at least they didn't say 'inmate'] imprisoned in any state prison as many hours of faithful labor in each and every day at his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections." It goes on to mandate that the CDC shall develop work programs to manage the operation and construction of prisons as self-sufficient as possible, and that if enough jobs can't be created to keep every prisoner faithfully employed, they "shall be assigned to manually produce electricity."

According to the *LA Times*, on February 26th about 1,000 prisoners in C-block at the CA state prison in Lancaster went on strike, refusing to come out of their cells for meals, recreation or job assignments. One prisoner quoted in the *Times* article stated the obvious response to proposals to take all privileges away from prisoners—even as trivial as the right to purchase candy and soda pops on the commissary—and strapping them to human electrical generating machines all day. "What incentive would a man have to do right? You ain't got nothing to lose." The wife of another CA prisoner was quoted as saying, "What you're doing is

creating a desperate subclass with nothing to lose."

Whatever "perks" or "privileges" prisoners have today were won through the often violent struggle of the 60's and 70's. Prisoners struggled then because conditions in the prisons were so oppressive that they "had nothing to lose." The states eventually gave prisoners the "perks" and "privileges" not because the prisoners were demanding them, or because they thought the prisoners deserved them, they were implemented as a way to restore and maintain order.

But as a unit case manager in this prison said to me the other day, "People forget. The legislature forgets about the riots in the 70's, and your average person on the street *certainly* doesn't remember when these places [prisons] were burning. They just forget." ■

Sources: *LA Times*, *Sacramento Bee*, *Info for Public Affairs* (an on-line database), and letters from a CA reader.

Forfeiture Violates Double Jeopardy

In the November 1994 issue of *PLN* (Vol. 5, No.11) we reported on the abuse of asset forfeiture laws by law enforcement agencies more interested in monetary gain than in any legitimate measure of justice. Shortly after that article went to press (*PLN* articles are typically written 2-3 months before they appear in the issue you read) the Ninth Circuit made a landmark ruling in an asset forfeiture case. The court ruled that when the government seeks a criminal conviction against defendants and also seeks forfeiture of assets in a separate civil action, and when both actions are based on the same illegal activities, that whichever action (criminal or civil) was prosecuted second is a violation of the Double Jeopardy Clause of the Fifth Amendment.

The ruling stemmed from a *pro se* brief filed by James Wren and Charles Arlt following their convictions of various counts of conspiracy and money laundering. In the criminal case, Arlt,

Forfeiture (continued)

Wrens and several others had been accused of conducting a large-scale methamphetamine manufacturing operation. The government instituted the civil forfeiture action five days after a grand jury issued a superseding indictment in the parallel criminal case. The forfeiture complaint listed \$405,089.23 in one bank account, \$8,929.93 in three other bank accounts \$123,000 in cash, 138 silver bars, a helicopter, a shrimp boat, a Piper 6 Cherokee plane, eleven automobiles and one other boat. The government argued that these pieces of property were connected to the offenses that were the subject of the parallel criminal case. It claimed the property was forfeitable on two independent grounds: as proceeds in illegal narcotics transactions under 21 U.S.C. § 881(a)(6), and as property "involved in" money laundering violations under 18 U.S.C. § 981(a)(1)(A.). Pursuant to a stipulation between the parties the district court effectively stayed the civil forfeiture action pending the completion of the parallel criminal case.

Eight months after the criminal convictions were obtained, the government filed for summary judgment in the civil forfeiture case which was granted by the district court. Arlt and Wrens *pro se* appeal of the asset forfeiture raised several grounds. The Ninth Circuit ruled that granting the appeal on the Double Jeopardy Clause of the Fifth Amendment would effectively moot the other issues raised and so limited its analysis to the Fifth Amendment. The court stated in part, "There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimant's criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property, because of its connection with the very offenses that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimants' criminal case and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes.... the only difference between the two proceedings was the remedy sought by the government. Yet the government could have sought both remedies without subjecting Arlt and Wren to multiple and successive proceedings. It could have in-

cluded a criminal forfeiture count in the indictment which led to the claimant's convictions. However, it did not choose to follow that course. Rather it elected to pursue its forfeiture action in a separate and parallel proceedings which was decided after the criminal trial. By doing so the government prevented Arlt and Wren from "being able, once and for all, to conclude [their] confrontation with society at the time of the jury's verdict." *United States v. Jorn* 400 U.S. 470, 496, 91 S. Ct. 547, 558 (1971).

The court addressed the question of whether the criminal and civil proceedings although labeled by the government as a "single, coordinated prosecution" could be considered as separate proceedings, and ruled, "that whether or not two actions are brought as part of a 'single, coordinated prosecution' is irrelevant for purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate 'proceeding.'"

The court then went on to rule on whether the forfeiture of assets in this case could rightly be considered "punishment" and thus invoke the Double Jeopardy Clause's prohibition against seeking "punishment" for the same criminal conduct in two separate and successive court actions. The court ruled that the forfeiture was clearly "punishment" because of the scope of the assets forfeited. The government argued that the forfeiture served a "remedial" purpose, that of forfeiting the profits gained through illegal activities. "The government apparently believes that we can conclude that money and property are derived from narcotics transactions simply because people with an interest in that property have been convicted of engaging in a narcotics conspiracy. Because with few exceptions, the government has not provided any evidence of a more specific link between narcotics transactions and the property at issue, it would be most difficult on the record before us, to conclude that the property consist entirely of illegal proceeds."

The court concluded therefore that the asset forfeiture in this case constituted punishments and sent a clear message by saying: "Were we to consider successive attempts to exact punishment to constitute the 'same proceedings' under the Double Jeopardy Clause simply because they were

brought as part of a 'single, coordinated prosecution,' we would be encouraging one of the worst abuses of prosecutorial power — the government's coordinated use of multiple proceedings to harass or exhaust particular defendants."

It should be noted that this case creates a split between the circuits. The Second and Eleventh Circuits have both refused to rule that parallel criminal and civil asset forfeiture cases constitute separate proceedings. As such this may case result in a U.S. Supreme Court review. We at *PLN* also thought it was notable that the ruling stemmed from a *pro se* filing by Arlt and Wren. See: *U.S. v \$405,089 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994).

The "defendant" in the above titled civil forfeiture case is "U.S. Currency." When the government seeks asset forfeiture in a *civil* case they are actually suing *the property and* not its owners. In this type of action the "property" is assumed to be "guilty" upon a showing of probable cause by the government. The burden of proof then rests with the owners of the property to show that it is *not* subject to forfeiture. Because of the way this proceeding is weighted in the government's favor, its use by law enforcement agencies has risen to alarming heights. The number of civil asset forfeiture actions by the government has increased so dramatically that it is apparent to all but a few that law enforcement agencies are motivated more by the prospect of "easy money" than by any legitimate law enforcement objectives. If this case is upheld by the Supreme Court it may seriously curtail the asset forfeiture abuses that are now common place among law enforcement agencies.

A copy of the decision was sent to us for review by F.E.A.R. (Forfeiture Endangers American Rights). Some attorney members of F.E.A.R. have written a book that studies this area of law in detail. The book is available for \$40 but is available to prisoners and forfeiture victims for \$20. *PLN* plans to obtain a copy of this book and review it in an upcoming issue. They also publish an excellent newsletter, *F.E.A.R. Chronicles*. Readers interested in more information should contact them direct. F.E.A.R. membership is \$35 per year and includes a subscription to *F.E.A.R. Chronicles*. Send membership fees to: F.E.A.R. 265 Miller Ave., Mill Valley, CA. 94941 Ph: (415) 388-8128. ■

Atty. Fees for Monitoring Consent Decree

In 1992 prisoners seeking to desegregate the Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio, entered into a consent decree with prison officials. Under the terms of the decree the cells at SOCF would be randomly integrated. After the April, 1993, rebellion at SOCF [see *PLN*, Vol. 4, No. 6] prison officials reverted to segregating the prison's cells by race. This was approved by the court [*PLN*, Vol. 5, No. 3] as a temporary post-riot measure. Prison officials later single celled the prison which had been among the plaintiff's requests in an earlier motion. The prisoner plaintiffs then moved for an award of attorney fees under 42 U.S.C. § 1988, which the court granted in the amount of \$21,690 in attorney fees and \$248.15 in costs.

The defendant prison officials opposed the motion for attorney fees claiming that because no litigation had taken place and

they had consented to the plaintiff's demands no fee award should be made. The court rejected this argument noting that no changes would have been made had the suit not been filed. Under sixth circuit and supreme court precedent whenever a party modifies their behavior towards the plaintiff that was the basis for the suit then the plaintiff is the prevailing party entitled to an award of attorney fees.

The court held that the plaintiff's attorneys have a duty to monitor consent decrees because such monitoring is essential for the long term success of the law suit. The supreme court has held that "post judgment monitoring of a consent decree is compensable activity for which counsel is entitled a reasonable fee." The court noted that in this case the prison reverted to its policy of racial segregation and the plaintiffs again had to seek court

intervention. Thus, an award of attorney fees was appropriate. Both attorneys in the case were awarded fees because their work was not duplicative and their fee request was reasonable. Moreover, they could be compensated for the time they spent trying to recover their attorney fees.

The court awarded one attorney \$175 per hour and the other \$185 per hour, finding that these were their regular rates and were reasonable within their community. The defendants disputed these amounts. The court referred to a recent law journal article comparing attorney fees in Ohio and held the hourly rates billed were fair. The court awarded counsel litigation costs as well, which reimbursed photocopies, express mail postage and hotel lodging for their expert witness. See: *White v. Morris*, 863 F. Supp. 607 (SD OH. 1994).■

No Habeas for Jailhouse Lawyer Aid

In a rather novel ruling the third circuit has ruled that federal courts lack authority to issue writs of habeas corpus to ensure that an imprisoned pro se litigant has the assistance of a jailhouse lawyer at trial. Michael Jones is a New Jersey state prisoner who filed suit claiming he had been raped by other prisoners. The case was scheduled for trial. Before trial Jones filed a motion for the appointment of counsel which the district court denied. After the court's denial Jones requested that Thomas Hill, a prisoner paralegal at the Trenton State Prison, be allowed to assist him at trial. The court agreed and issued a writ of habeas corpus directing the warden at TSP to produce Jones for the trial and Hill to assist him. The prison official defendants appealed and the court of appeals for the third circuit vacated and remanded.

As a preliminary matter, the appeals court held that it had jurisdiction to hear the appeal as an interlocutory appeal. It also held that the defendants, who would not personally bear the cost of transporting Hill, were the proper parties to file the appeal.

Jones did not seek a writ of habeas corpus *ad testificandum* or *ad prosequendum* pursuant to 28 U.S.C. § 2241(c) which allows federal courts to issue writs ordering the attendance of prisoners to

participate in trials as witnesses or to stand trial as plaintiff or defendant. Instead, he relied on the All Writs Act, 28 U.S.C. § 1651 which is "a flexible and expansive grant of authority for federal courts to issue modified versions of habeas writs not specifically enumerated in § 2241."

The appeals court held that the purpose of the All Writs Act is to aid the federal courts in the exercise or preservation of their jurisdiction and the means selected must be analogous to a common law writ. Taking a historic view of the writ of habeas corpus and the purposes it has served over the years the court concluded, "It is neither reasonable nor practical to use a writ historically associated with the fight for human freedom to provide a plaintiff, especially in a civil proceeding, with a lawfully confined prisoner for assistance. In short, Jones points to no authority, principle, or interest of justice, nor have we found any, that would convince us to expand the usage of a habeas writ to produce a prisoner so that he can aid a fellow prisoner in prosecuting a civil suit. Thus, the writ in issue cannot be said to be consistent with typical habeas writs and is therefore not 'agreeable to the usages and principles of law.' Permitting such an expanded usage of the writ would inevitably encourage

the usage of 'jailhouse' lawyers in the courts, elevate prison costs in the transportation and guarding of prisoners to, from, and in the courthouse, and seriously increase the risks associated with having prisoners outside prison walls."

The court noted that other options are available, such as proceeding *pro se*, requesting the appointment of counsel and the possibility of finding counsel on a contingency basis. The court noted that Jones had requested appointment of counsel and been denied. Readers will note that while a *pro se* litigant suffers no prejudice representing themselves in a bench trial, other circuits have held that forcing a *pro se* prisoner to appear in front of a jury without counsel constitutes reversible error in and of itself.

"Accordingly, as the writ issued by the district court is not consistent with the usages and purposes behind the variants of the habeas writs, we hold that a federal court is not empowered, pursuant to the All Writs Act, to order state officials to produce a state inmate for the purpose of providing assistance at a civil trial." The lower court's order was vacated and the case was remanded to the lower court for further proceedings. See: *Jones v. Lilly*, 37 F.3d 964 (3rd Cir. 1994).■

Federal Habeas Rarely Granted

The National Center for state Courts in Williamsburg, VA has released a study conducted by Victor Flango concluding that post conviction challenges by prisoners in state or federal court are rarely successful. The report was originally commissioned in 1989 by the Conference of Chief Justices to determine if state court reforms could reduce the need for federal habeas corpus review. The report claims to be only the second multi-state study of habeas corpus ever made. The courts studied are located in Alabama, Texas, New York, California and the federal district courts located in those states. The data gathered was based on state and federal habeas filings in 1990 and 1992.

The report concluded that the number of federal habeas filings by state prisoners has remained relatively constant over the past thirty years. In 1963, when the supreme court substantially increased the availability of federal habeas review to state prisoners the number of filed federal habeas petitions was 2,106. This represented 1.08 percent of all state prisoners. In terms of percentages of state prisoners this number grew to 5.14 percent in 1970 but has retreated every year since. In 1991 federal courts received 10,323 habeas petitions which is a little over one percent of the 752,525 state prisoners held that year. The increase in habeas corpus filings comes from the increase in the number of prisoners rather than prisoners filing more petitions.

The majority of habeas petitions came from nine states: California, Texas, New York, Florida, Pennsylvania, Alabama, Missouri, Louisiana and Michigan which combined for an average of 465 petitions per year. The remaining 41 states and the District of Columbia and Puerto Rico averaged 116 petitions each. The nine states with the most petitions are also among those with the largest prison populations. The report concluded that the work generated by these habeas petitions is not "a large portion" of the district court's case loads and the vast majority are dismissed. While the petitions consume little judge time they do require staff to sift through the writs for meritorious claims and to determine whether counsel should be appointed.

Most habeas petitions are filed by prisoners convicted at jury trial and serving long sentences. Less than one percent of habeas petitioners were represented by

retained counsel at their state or federal trial. Most habeas petitions are filed by *pro se* prisoner litigants because there is no rule or law requiring counsel be appointed to assist with federal habeas petitions. Before a claim can be presented to a federal court it must have already been presented to a state court to determine if constitutional error meriting reversal of a criminal conviction has occurred. Over the years the availability of federal habeas has been steadily decreased in a number of rulings by the supreme court.

The report noted that whatever the claim raised by habeas petitioners the rate at which petitions were granted was very low. The same is true for federal courts. The author's attempt to study the characteristics of a successful habeas petition failed because too few were granted to support any conclusion at all. The lack of successful petitions also did not allow a comparison between writs filed by prisoners versus those filed by counsel.

The study concluded that habeas petitions are granted more often in death penalty cases than in non-capital cases. A federal court is more likely than a state court to grant habeas relief to a death row prisoner. The report disputed the popular notion that "40% of death sentences are overturned on federal habeas." Many of these "successes" were later overturned and the petitioner executed. The report suggested that the debate over the death penalty should be "joined directly, rather than having all habeas corpus reform efforts in *all* cases driven by attitudes towards the death penalty."

The report concluded that states' annoyance over federal court oversight is unwarranted given the small number of state court convictions actually overturned. The most likely chance that a habeas petition will be granted is the first time it is presented in state court. While only a small number of prisoners file habeas petitions they tend to proceed *pro se* so courts should evaluate the need for additional *pro se* law clerks in prisons or staff attorneys to screen the petitions.

Copies of the 102 page report are available for \$2.00, plus postage and handling, from: Carrie Clay, National Center for State Courts, Box 8798, Williamsburg, VA 23187-8798. (804) 259-1812. ■

Reviews:

By Paul Wright

What you're holding in your hands is referred to as the "Alternative Press." We are called that because we offer an "alternative" view to that provided by the corporate media. In our case we are advocates for the rights and well being of prisoners and seek to add our perspective to the criminal justice policy debate. Ours is a small voice because unlike the corporate media we aren't subsidized by advertising and deep pocket publishers. Because we rely directly on reader support we are able to represent the views and interests of progressive prisoners.

We frequently review and plug other alternative publications because we believe it is important to inform people about their existence and encourage support for the alternative media. None of us can afford to advertise, the only way we can make ourselves known is through word of mouth and supporting each other. We are especially anxious to support other prisoner publications, by this I mean publications by and for prisoner interests, not the ones published by prisons that are censored and all too often are nothing more than the warden's public relations office. Ideally, every state should have a monthly newsletter similar to *PLN* that can focus specifically on issues and struggle particular to that state.

When *PLN* started it was mainly focused on Washington state. While we still are to an extent, we have since grown and expanded to have a more national focus with only about 12% of our readership residing in Washington state. For those who ask why have a newsletter or a newspaper the reason is simple: it provides a means by which to disseminate information, coordinate strategy for litigation, political and other forms of struggle and keeps us informed of what is happening. Philosophers have asked if a tree falls in the forest and no one is there to hear it does it still make noise? Our relevant question is if prisoners struggle and no one knows about it does it have an impact? Yes, but not as much than if the world knows about it.

Organizing around a newspaper or newsletter is not a new idea. Lenin's *What is To Be Done* gives an eloquent and timeless explanation of this concept.

Reviews (continued)

Maintaining a flow of ideas, news and communication in and out of the prisons is a vital issue. That's why we ask that you support the alternative press over the corporate media. In the past I have considered writing a brief "how to" guide for prison newsletters which would essentially give the practical aspects of what we have learned in five years of publishing *PLN* and contacts we have had with other publishers over the years. Being short on time this has not been a priority. If anyone is interested in this drop me a line and let me know, enough interest and I'll make it a priority.

Raze the Walls: is a resource directory for prisoners listing sources of legal, political, religious and prison information. It lists numerous groups who are active on prison issues, the death penalty, political prisoner issues, etc. It also contains a pen-pal section. Produced by prison struggle supporters it contains information of interest to people on the outside who are interested in supporting prisoners and learning more about prison struggles. Prisoners should send \$2.00 in stamps, free folks should donate what they can over \$2.00 to help cover production and mailing costs. Write: Raze the Walls, P.O. Box 22774, Seattle, WA 98122-0774.

Jericho Newsletter: is a new publication edited by former prisoner Michael Stephens. The October, 1994, issue contained articles about the death penalty, prison beatings, pen pal ads and more. They are seeking more prisoner input to expand the content and size of their newsletter. To subscribe send a donation to: J.N. P.O. Box 1983, Cincinnati, OH 45201-1983.

The Bridge: is the bi-monthly newsletter of the Prisoners' Self Help Legal Clinic in New Jersey. While it is aimed at New Jersey prisoners and includes developments in state courts (including small claims, appellate, county level, etc.) it contains legal information useful to prisoners everywhere, especially in the third circuit. It also contains legislative and political information affecting prisoners in New Jersey. I find each issue informative and helpful, the important thing is that their emphasis is on educating prisoners so that we can help ourselves through the legal system rather than rely

on others. To subscribe send a donation to: Prisoners' Self Help Legal Clinic, 2 Washington Place, Newark, NJ 07102.

Pro Se: is a newsletter published quarterly by Prisoners' Legal Services of New York and is aimed at helping New York state prisoners help themselves by reporting on legal, political and legislative developments affecting them. It reports state and federal rulings affecting New York state prisoners (*PLN* usually doesn't report many of these state court cases because they tend to be highly fact specific and of limited relevance to the bulk of our readership, in or out of a given state. We do report all the relevant federal cases.). Subscriptions are free to New York state prisoners, others should inquire about subscription prices to: Pro Se, P.O. Box 6766, Ithaca, NY 14851.

The Voice: is the quarterly newsletter of Murder Victims Families for Reconciliation (MVFR) which is a group that actively opposes the death penalty and offers a rational and non-inflammatory view of criminal justice issues. In the July, 1994, editorial, I made a comment about reactionary victim's rights advocates who seek to roll back the small gains made by prisoners over the years. MVFR vice chair, and *PLN* supporter, Theresa Mathis wrote to remind me that not all crime victim or murder victim family members think alike and encouraged me not to perpetuate that lie. She is quite right and I should have known better. My apologies to MVFR and crime victims who do not support or advocate criminal justice policies based on hate, revenge and retribution. In addition to its newsletter MVFR provides speakers and other information to those interested. When the corporate media trots out the reactionary victims of crime bear in mind that there are other voices out there. Subscriptions are available for a donation, write: MVFR, P.O. Box 208, Atlantic, VA 23303-0208.

Florida Prison Legal Perspectives: is an excellent brand new newsletter aimed at Florida prisoners, their families, supporters and general public. This is one of the best first issues we have seen. Eight pages long and bimonthly the first issue had articles on harassment of prison visitors, illiterate guards who fail their hiring tests after being trained by the DOC, the Florida DOC grievance system and the successful court challenge to the random

drug testing program in Florida. It also includes resources and other information. All Florida prisoners should get this zine. Subscriptions cost \$4 for prisoners, \$8 for free people and \$20 for institutions, from: FPLP, P.O. Box 660-387, Chuluota, FL 32766.

Double-Time is the bimonthly newsletter of the National Clearinghouse for the Defense of Battered Women. The newsletter covers issues of interest to women prisoners in general, prison resources, articles and more. In addition to the newsletter the Clearinghouse also provides critical assistance, resources and support to battered women who have killed or assaulted their abusers while protecting themselves, been coerced into crime by their abusers or are charged with failing to protect their children from the batterer. They provide legal, social science and psychological information on these issues to defense teams as well as consultations, resources and direct information. Anyone interested in the topics of violence against women, women in prison, etc. should check this out. Subscriptions are free to women in prison, individual rates are \$35. Contact: NCDBW, 125 S. 9th St. Suite 302, Philadelphia, PA 19107. (215) 351-0010.

Underground: is the quarterly magazine of the North American Animal Liberation Front Supporters Group. They are dedicated to ending the exploitation of animals by any means necessary. Issues focus on militant actions around the world has taken against furriers, vivisectionists, factory farms, etc. It also includes sections on prisons and prisoners support, especially for those captured and imprisoned as a result of their animal liberation activities. They also have other publications and information available. At a time when most of the mainstream "environmental" groups have sold out to corporate interests the ALF is an international grassroots efforts to make animal exploiters accountable for their actions. Highly recommended. Send donation to: NA-ALFSG, P.O. Box 8673, Victoria, B.C. V8X 3S2, Canada. ■

News in Brief

WA: Dean Wilkins, a Kitsap county jail guard, resigned on January 20, 1995, after county detectives investigated a complaint that he had had consensual sex with a female prisoner at the jail. The complaint was made by another prisoner who witnessed the incident.

FL: In the March, 1995, NIB section we reported the five prisoners who tunneled out of the Glades Correctional institution. On January 10, 1995, more than 80 heavily armed police surrounded two of the escapees, Florencio Alvarez and Armando Junco, in a shack at a homeless area. Alvarez tried to hide while Junco attempted to flee out the back door. A Miami cop shot and killed the unarmed, 63 year old Junco. Police charged Alvarez with second degree felony murder in Junco's death. He faced another life sentence if convicted. Prosecutors later dismissed the charges.

VA: On February 5, 1995, prisoners at the Lorton prison's maximum security cell block left their cells after a power problem opened the cell doors of 88 prisoners at 1 AM. Two guards were stabbed and four others injured during the nocturnal cell release. Six prisoners suffered injuries as well. It took prison officials six hours to subdue the prisoners.

WA: On January 25, 1995, the state DOC announced that it had selected Grays Harbor as the site for another 1,936 bed state prison. Prison boss Chase Riveland said that a Stafford Creek site off Westport highway had been chosen as the site for the prison. Yakima and Klickitat counties lobbied extensively to get the new prison. They should soon get prisons as well, according to DOC projections the state must build one 2,000 bed prison every 27 months just to keep up with a prison population at 140% of the system's rated capacity.

SC: On January 10, 1995, the state legislature started its new session with Republicans controlling the governor's office and legislature. However, Senate Corrections Committee Chairman Theo Mitchell wasn't present to celebrate. He was serving a 90 day jail term for failing to report large cash transactions.

OH: Michael Wood, a prisoner at Lucasville, pleaded guilty to possessing dangerous ordnance and was given a sentence of three to five years, to be served concurrently with his sentence of aggra-

vated murder. Wood was found to have a homemade gun and .22 caliber bullets in his cell. In 1993 prison guard Robbie Stringer was arrested smuggling 13 bullets into the prison [PLN, Vol. 4, No. 12] for Wood. On previous occasions Stringer had given Wood bullets. Shortly after Stringer's arrest, Wood began writing letters to the Ohio Attorney general, reports and the local county prosecutor vowing to kill warden Arthur Tate with the bullets from Stringer. The prosecutor stated: "If it hadn't been for his letters, he never would have been prosecuted."

CA: Bennie Powell spent 17 years in prison accused of killing a cop. The conviction was eventually overturned after it was shown that he was innocent and could not have killed the cop and was convicted on perjured testimony. Powell was awarded \$3.5 million for the wrongful conviction. In February, 1995, he was sentenced to 52 years in prison after being convicted of two rapes, the first of which occurred some 13 months after his release from prison. His attorney unsuccessfully argued that he be given credit for the time served in the prior conviction of which he was innocent, arguing that the wrongful conviction had contributed to Powell's inability to relate well to women.

USA: In 1993 federal law enforcement agencies spent \$97 million on informers, four times what they spent eight years earlier. An article in the February 13, 1995, *National Law Journal* quoted judges and attorneys who said that the use of informants had gotten out of hand. Former DEA agent Mike Levine stated that federal agents had allowed "15,000 wild, out of control informants" to take over investigations.

USA: Hardy Rauch, of the American Correctional Association states there is a national average of three prison employees for each prisoner. This includes doctors, case workers, administrators, support staff, etc. in addition to guards. With more than one million prisoners locked up in the US this translates into more than 3 million citizen employees.

WA: On February 7, 1995, Victor Calender, a King County (Seattle) jail guard was dismissed after the jail sustained nine counts of misconduct against him. Several of the counts included Calender having sex with female prisoners at the jail. The prosecutor's office has

not yet determined if it will file charges against Calender resulting from a separate investigation of sexual contact with three female prisoners.

VA: Janice Hubbard met her husband Alphonso Forte while working as a District of Columbia jail guard while Forte was doing time at the Lorton prison in Virginia. They married in 1993. Earlier this year Hubbard helped Forte escape from jail when he was sent to the jail for treatment for depression. Hubbard was dressed in her uniform when she escorted Forte out of the jail and into a waiting car. The couple was arrested three days later when they were picking up a money wire at Western Union.

AZ: On February 12, 1995, prisoners at the state prison in Winslow barricaded themselves in a kitchen and set fires. A DOC spokesman Mike Arra stated that the rebellion invoked 30-40 prisoners and claimed not to know the reason for the uprising. After guards fired tear gas and stun grenades into the dining hall some prisoners surrendered, other retreated into the kitchen and barricaded themselves and set more fires. Arra stated no hostages were taken and only one guard suffered a minor injury. No other information is available to PLN as we go to press, but keep us posted.

Haiti: On February 18, 1995, more than 520 prisoners in the country's main prison in Port Au Prince rioted, angry at delays in the legal process. The prisoners threw rocks and set fires, injuring at least six prisoners. Fifteen prisoners escaped during the melee. The prisoners were protesting the fact that most had been imprisoned for many months for minor offenses and have not been before judges. U.S. troops supporting the puppet regime of Jean Aristide cordoned off the prison area with barbed wire and did not participate in the prisoners' repression. One U.S. soldier was quoted saying "we just let them burn what they wanted to burn."

Australia: Prison officials have complained that people are filling tennis balls with drugs and then lobbing them over prison walls into the nations' jails and prisons. Other means of drug smuggling identified in a government report are smugglers firing drugs into prisons with crossbows and the time honored method of drug filled cakes. The government has announced plans to step up prison security and use drug sniffing dogs to patrol for people "with suspicious tennis balls." ■

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Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls

by Ronald Kuby and William Kunstler
Introduction

On any given day in America, more than a million and a half people¹, in prisons and jails² spend their days subjected to the most rigorous censorship, denied the fundamental rights protected every-where else by the freedom of speech guarantees of the First Amendment.³ They are denied reading material deemed objectionable by their captors, exposed to retaliation for expressing opinions at odds with those of their jailers, refused access to the news media,

punished for possessing "radical" views, and rewarded for renouncing them. The prison authorities, more often than not, are persons of limited intellectual capacity and of authoritarian attitudes whose primary penological goal is to maintain order.

As this country abandons whatever liberal pretensions it once had about achieving an equal society, the population of prisons and jails has grown apace with the poor and the dispossessed. The United States now leads the world in per capita incarceration, having finally overtaken the Soviet Union.⁴ Approximately 615,000 persons are confined to state and federal correctional institutions on any given day. [Editors' Note: that figure tops over one million now.] More than one million are confined to county or municipal jails, either awaiting arraignment or trial or serving short sentences for petty offenses.⁵

Only in the area of imprisonment does a person with black skin or Latino heritage have a better chance than does a white person. More than sixty-three percent of the nation's prison population is black and Latino.⁶ Nationally, a black youth between the ages of eighteen and twenty-two has a better chance of going to jail than going to college. In Washington, D.C., on any given day in 1991, forty-two percent of the city's African-American men between the ages of eighteen and thirty-five were in jail or prison, on probation or parole, awaiting trial or sentence, or sought on warrants. In Baltimore, fifty-six percent of the city's young black males were under some form of sanction by the criminal justice systems.

The nation's penal system has become the primary means for socializing an entire generation of minority youth. It is to the jailer that we have entrusted the task of inculcating in these youth the cherished notions of democracy and the values of a free society, the foremost of these being freedom of speech. The nation's wardens have shown the solicitude for free expression and the marketplace of ideas that one might expect from those whose life's work is caging their fellows. And prisoners have been utterly abandoned by the federal courts, whether the winds of the United States Supreme Court blow left or right.

The Supreme Court's Approach to the Free Speech Rights of Prisoners

The doctrinal infrastructure that has permitted prison officials around the country to crush free expression is not a product of the "gang of five" — the Reagan-Bush appointees to the Supreme Court. Indeed, the foundations were laid in the early 1970s by a Court that was still one of the most "liberal," in terms of civil rights, of any in the history of American jurisprudence.

In *Procunier v. Martinez*,⁸ the Court faced a variety of content-based restrictions on outgoing prisoner mail. Beginning its analysis with what was to become a familiar paean to the tasks and toils of prison administrators, the Court noted those who run prisons faced "Herculean obstacles" that were "too apparent to warrant explication." Courts are "ill equipped" to deal with these problems, which require expertise "peculiarly within the province of the legislative and executive" officials.

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With virtually no discussion of the over-arching value of free speech guarantees in American history, the Court in *Martinez* stated that a regulation limiting free expression would be upheld if it was directed to one or more "substantial" governmental interests and was "no greater than is necessary or essential to the protection of the particular governmental interest involved."

The idea that this created a "least restrictive means test" of the type that would apply to anyone else's rights was scotched a few paragraphs later, when, in an often-quoted passage, the Court noted:

"This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty."

Nowhere did the Court in *Martinez* explain why the standard set forth in *Tinker v. Des Moines Independent Community School District*,¹⁰ requiring proof of some actual harm flowing from the exercise of free speech, should not apply in prisons.

The Court in *Martinez* cited order and discipline, maintenance of security against escape and unauthorized entry, and rehabilitation as interests that would justify limitations on a prisoner's freedom of speech.¹¹ The Court did strike down the regulation at issue, largely because of the difficulty it had understanding how *outgoing* prisoner mail could lead to problems *inside* the prison. Other courts were to be more imaginative.¹²

Less than two months later, in *Pell v. Procunier*,¹³ the Court up-held a blanket ban by the State of California on face-to-face interviews with prisoners.¹⁴ The Court in *Pell* held that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."¹⁵

However, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penal objectives of the correctional system."¹⁶ Restrictions on prisoners would be judged "in light of . . . legitimate penal objectives." In two

months, "substantial" and "important" interests had fallen to mere "legitimate" ones. And one of those legitimate goals was security and "related administrative problems."

Retreating still further from the suggestion that its decision in *Martinez* required elevated scrutiny whenever the First Amendment is implicated, the Court in *Pell* held that deference would be the touchstone, as security problems in prisons were peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

Thus, the Court decreed that mere administrative problems related to security could be the basis to deny free speech, and that such denials required the deference of the courts.

The decision in *Pell* was widely regarded as establishing a "reasonable relationship"¹⁷ test, both by its terms and its result. According to the Court, all report-

ers may be barred from face-to-face meetings with prisoners by the warden's assertion of security concerns that were so "obvious" that they did not even require explication. But attorneys and clergy, as well as friends and families of the prisoners, entered the prisons for face-to-face meetings on a regular basis. The Court in *Pell* did not even question why the same security precautions used for those visits could not be used for the press. Nor did the Court consider the fact that excluding the news media, while permitting other visitors, suggested that prison officials had an agenda more directed to the suppression of expression than the suppression of disorder.¹⁸

After *Pell*, the Court had no difficulty upholding regulations that prohibited meetings of a prisoners' union, solicitation of other prisoners to join the union, and distribution of union literature by prisoners. In *Jones v. North Carolina Prisoners' Labor Union, Inc.*,¹⁹ the Court deferred to the determination of prison officials that a gathering of prisoners for a union meeting created hosts of fearsome security threats. That those same threats

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mysteriously evaporated when those same prisoners went to meetings of the Jaycee, Boy Scouts, and Alcoholics Anonymous did not trouble the Court.²⁰ Unlike a union, those organizations fulfill a "rehabilitative" function, according to the prison administrators. That North Carolina officials might invoke "rehabilitation" or "security" as a subterfuge to prevent the expression of views different from theirs apparently never occurred to the Court.²¹

Finally, in *Bell v. Wolfish*,²² the Court held that pre-trial detainees were entitled to no better treatment than convicted mass murderers, and "deference" was enshrined as a value of almost religious magnitude. In the process, the Court in *Wolfish* upheld a rule prohibiting hard-back books from entering the institution unless they were mailed by a publisher, book club, or book store. The prison argued that contraband could be secreted within the hard covers, and screening the books fluoroscopically, although not impossible, would consume "substantial and inordinate amount of available staff time."²³ Because the rule was a "rational" response to a security issue, it was upheld.²⁴

The Grim Application by the Federal Courts

These cases established the framework for the free speech rights of the millions of Americans to pass through the American penal system in the 1980s and early 1990s—the decade that would see the greatest growth in prison population in history. The lower federal courts, packed with Reagan-Bush clones and aided by a Justice Department eager to have as many people enjoy as few civil liberties as possible, were free to savage the free speech right of prisoners. Indeed, entrusting trained chimps to paste up clichés from *Pell*, *Martinez*, *Jones*, and *Wolfish* above the word "denied" would achieve roughly the same result as seeking redress from the federal judiciary.

A. Content-Based Restrictions: Prior Restraints on Incoming Materials

As the Supreme Court has noted, "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."²⁶ Justifying a prior restraint requires "proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport al-

ready at sea."²⁷ However, if you are serving a two-month sentence for marijuana possession or are in jail awaiting trial, too poor to make bail, then a determination by a prison warden, no matter how ignorant, that receipt of a particular book will affect the security of the institution is sufficient for the publication to be banned.

In *Espinoza v. Wilson*,²⁸ officials at a Kentucky state prison prohibited persons from receiving gay rights publications, even an issue-oriented, national publication like the *Advocate*. The prison "officials determined that if a specific publication advocated or legitimized a homosexual lifestyle in totality, then it would be withheld."²⁹ The warden put it even more bluntly—"anything that could be construed as 'condoning homosexuality'" would be barred.

The warden asserted that such materials were a threat to the security of the institution, claiming that prisoners might be physically assaulted for possessing such materials. Furthermore, he contended that tolerating the expression of opinion tolerant of a homosexual lifestyle could lead to more homosexuality, which he perceived to be a danger in prison. The United States Court of Appeals for the Sixth Circuit found the first contention wholly unsupported by the record, but agreed that the second justification fell well "within the wide discretion" accorded the warden.³⁰

Similarly, in *Wagner v. Thomas*,³¹ the United States District Court for the District of Texas upheld a regulation promulgated by the Dallas county jail prohibiting publications that depict "nudity, pander to sexual interest, advocate racial prejudice or present a security threat to the jail."³² Individuals seeking to obtain reading materials were required to consult the "jail commander" before subscribing.

There is no indication that the jail commander had any particular expertise in the areas of comparative or modern literature. Indeed, the opposite was the case. He testified that commercially available magazines such as *Playboy* and *Penthouse* would be banned, but he was not sure about the *National Enquirer* or *Rolling Stone*, because he was "not familiar with [them]." He claimed that the rule was justified because materials that depict nudes might cause prisoners to fight over the magazines, although there was no indication that this had happened in that jail. Nonetheless, the Dallas jail commander was entitled to great deference.

There is, apparently, no "ignorant peckewood" exception to the rule of deference.

Nor are publications expressing political speech given any greater protection. In *Vodicka v. Phelps*,³³ a prison reform organization published a newsletter called *Inside*, and regularly mailed it to prisoners at a Mississippi state prison. One edition reported that a prisoner work-stoppage had taken place five weeks earlier. The warden refused to allow the publication into the prison, based both on the content of the article and the philosophy of the group that published it. Although the article neither advocated future work-stop-pages nor claimed that the past one had been justified, the warden stated that the "tone of the article" sounded as if the group had approved of the stoppage.³⁴ He was not more specific.

As to the nature of the group, the warden stated that the article was censored because the group existed to:

"Encourage convicts, ex-offenders and friends and families of prisoners to come together to make themselves heard and to demand that changes be made by our elected officials and prison administrators. [It] seeks to empower those who have never had a voice in the system."

The warden determined that the group focused on "redress and/or change of the entire dilemma of incarceration." This created a "potential for trouble. That potential must be avoided."

Incredibly, the Fifth Circuit agreed, finding that under *Pell* and *Martinez*, the prison's determination of likely adverse consequences was enough to justify the exclusion of the article. And the court in *Vodicka* deferred to the prison authorities even though news stories substantially similar to the one in *Inside* had already entered the institution from mainstream newspapers which covered the work-stoppage.

In the same vein, the United States Court of Appeals for the Fourth Circuit, in *Pittman v. Hutto*,³⁵ upheld the prison administration's suppression of one issue of an award-winning prison newspaper. Assistant Superintendent Sue Kennedy determined that some of the articles were not "factually correct," "out of line with good taste," and not "fair to the administration."³⁶ Kennedy was particularly concerned with the truth of the articles. Relying on *Jones*, the Fourth Circuit tossed away two hundred years of First Amendment doctrine regarding the

Free Speech (cont.)

search for truth in a democracy, and upheld the ban.³⁷

B. Punishment for the Expression of Unpopular Views

In the demonology of the free speech violations, retaliation for the expression of unpopular views ranks second only to prior restraints. But prison officials have not hesitated to use their position of total control over every aspect of a prisoner's life to punish³⁸ an inmate for expressing unpopular views. And the federal courts, usually on guard against the natural tendency of the powerful to lash out against the voices of the powerless, show unbecoming credulity when administrators dutifully insist that their goals were proper.

In *Caruth v. Pinkney*,³⁹ Alsansa Caruth, a black prisoner, working as a law clerk at an Illinois state facility, was told that some guards and white inmates were soliciting membership in the Ku Klux Klan. Caruth obtained a copy of a KKK application as proof. He surreptitiously photocopied it and sent it to corrections officials and to the news media. Prison officials, after an investigation, charged Caruth with improper use of the prison copier, placed him in solitary confinement for thirty days, and dismissed him from the position of law clerk. The United States Court of Appeals for the Seventh Circuit upheld the punishment, holding that the regulation was a reasonable time, place, and manner restriction, and that the punishment was not a pretext for letting the public know about KKK activity. Sure.

But the prize goes to the United States District Court for the Northern District of California in *Martin v. Rison*.⁴⁰ Dannie Martin, a federal prisoner, wrote a feature for the *San Francisco Chronicle* entitled "The Gulag Mentality," sharply criticizing prison officials. Immediately after the publication of the piece, he was placed in solitary confinement, and then transferred to another institution. Prison officials alleged that Martin had violated rules that prohibited conducting a business while confined, and acting as a reporter or publishing under a by-line.⁴¹

The district court held that "engaging in writing activities is not a constitutionally protected right Such activities are delegated by Congress to the discretion of the Bureau of Prisons." As long as the restrictions are rationally related to promoting prison security, they will be up-

held.⁴² The district court had no difficulty coming up with fistful of possible harms that the regulation was geared to prevent, all of them speculative and unsupported by any evidence.⁴³

Prison officials received some threats after the article was published, observed an increase in tensions, and noticed an unusually large number of prisoners in clusters. The district court somewhat sheepishly noted that these manifestations may well have been responses, not to the article, but to the action of prison authorities in placing Martin in solitary confinement. Whether or not the prison's censorship created the very security threat that was being used to justify the censorship in the first place was irrelevant to the district court.⁴⁴

Prison officials also are free to punish prisoner's for showing "disrespect." In *Scarpa v. Ponte*,⁴⁵ the prisoner wrote a letter to a guard which was "arguably mocking, taunting, and disrespectful."⁴⁶ That provided a suitable basis for imposing discipline, as long as the officials themselves were acting with a good faith belief that the punishment was necessary to maintain order. Similarly, in *Gibbs v. King*,⁴⁷ the United States Court of Appeals for the Fifth Circuit upheld a prison regulation prohibiting a prisoner from making or writing "derogatory or degrading remarks about an employee," finding that the "clear purposes" of the rule were to "prevent the escalation of tension" and to allow guards to work without "verbal challenges to their authority."⁴⁸ The United States Court of Appeals for the Third Circuit went one step further in *Hadden v. Howard*,⁴⁹ permitting internal prison discipline for "insolence," "disrespect," and "lying to an employee," even when such conduct took place in the form of an official grievance filed by a prisoner.⁵⁰

C. Violation of Freedom of Conscience

If punishing someone for expressing certain views is odious to a free society, inflicting torture until one renounces his or her views is medieval, yet permitted by the federal judiciary. In *Baraldini v. Meese*,⁵¹ prisoners challenged the conditions at the federal High Security Unit ("HSU") for Women, at Lexington, Kentucky, as well as the criteria by which they were placed there. The HSU was a prison within a prison, located in a specially modified basement. Little, if any, natural light entered the institution. The prisoners

had no personal contact with each other and virtually no visitors. They were monitored by cameras twenty-four hours per day, even when they showered. Every time they left their cells, even for medical care or for a shower, they were handcuffed and shackled. After a year in the HSU, the women experienced mental deterioration, sensory disturbances, perceptual distortions, and concentration difficulties.⁵² Experts, including the former Secretary of Maryland's Public Safety and Correctional Services, testified that such conditions were improper for anyone.⁵³

How were prisoners selected for this treatment? Bureau of Prisons ("BOP") Director Michael Quinlan acknowledged that "a prisoner's past or present affiliation, association or membership in an organization which . . . attempts to disrupt or overthrow the government of the United States . . . is a factor considered" regarding placement. Another BOP official was more blunt, noting that placement was based on "committed alliance to terrorist-oriented ideals and politically-revolutionary organizations."

The women were specifically informed by prison staff that the only way they would be able to merit a transfer was if they would "disavow any association with leftist political groups." BOP officials admitted that "if they received reliable outside information that plaintiffs were no longer affiliated with such organizations, they would consider relocating them."

In finding both the conditions of the prison as well as the criteria used for placement unconstitutional, the United States District Court for the District of Columbia held: "[C]onsigning anyone to a high security unit for past political associations they will never shed unless forced to renounce them is a dangerous mission for this country's prison system to continue." The United States Court of Appeals for the District of Columbia Circuit reversed, finding that the right of the prisoners to "continue to hold violent, revolutionary views . . . do[es] not require prison administrators to ignore those views . . . in assessing the dangers of their escape from custody with outside help."⁵⁴ Renunciation of those views simply meant that the security threat had diminished. The fact that two of the plaintiffs had no prior escape history, while many other prisoners with prior escape history remained in general population, did not affect the analysis.

In *Nickens v. White*,⁵⁵ prison officials at a medium security institution placed an inmate in solitary confinement and then transferred him to a maximum facility when he refused to take his name off a petition. The petition, signed by about two hundred prisoners, was directed to a state official and protested prison conditions. The United States Court of Appeals for the Eighth Circuit upheld both the policy against petitions as well as its peculiar enforcement. The court found no First Amendment problem in punishing a prisoner for refusing to renounce his prior speech.⁵⁶

D. Restrictions on Prisoner-To-Prisoner Contact

A judiciary that permits the punishment of a prisoner for writing an unflattering news story for a national publication on the ground of "institutional security" has had no trouble permitting prison officials to deny persons within the prison community the right to communicate with each other. In *Jones*, the Supreme Court held broadly that whatever rights prisoners retained to associate with each other could be "curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations ... possess the likelihood of disruption to prison order or stability, or otherwise interfere with... legitimate penological objectives."⁵⁷

Prison officials are free to deny prisoners any right of association with each other by confining them in solitary confinement.⁵⁸ But as a practical matter, few prisons are run under such conditions; it is inevitable that prisoners will come into physical proximity, or at least sight, of each other. Prison officials are still given vast authority to regulate the communication among them. In *Dooley v. Quick*,⁵⁹ two prisoners were placed in different modules within the prison, following unproven allegations of homosexual contact between them. This placement ended their physical contact, although they still tried to communicate. They were then punished for attempting to pass a letter and for twice "wig-wagging hand signals ... through a glass window."⁶⁰ The United States District Court for the District of Rhode Island upheld the punishment, ruling that "[t]his is at bottom, precisely the sort of administrative decision which is best left to the trained custodial professionalism of correctional managers, rather than to the courts."⁶¹

The decision in *Dooley* presaged the Supreme Court's ruling in *Turner v. Safley*,⁶² which upheld a general ban of letters between prisoners in different institutions. Overturning the lower court's strict scrutiny analysis, the Court in *Turner* placed its imprimatur on the reasonable relationship test already in general use.⁶³ The Court then found that the security justification—preventing transmission of escape plans and planning of assaults—warranted the ban.

Even when prisoners are allowed to communicate with each other, prison officials are entitled to censor the content of their communications and punish critical speech. In *Adams v. Gunnell*,⁶⁴ three prisoners were placed in solitary confinement, and then given an institutional "trial" where they were convicted and sentenced to loss of all "good time"⁶⁵ because they had signed and supported an "illegal petition." The petition, gentle in tone, alleged that black prisoners were denied some opportunities granted to whites, and requested that "avenues and strategies" be developed to address this problem. The petition was sent to the warden, a local paper, and the ACLU. The Fifth Circuit, noting that the warden had cited several constitutionally impermissible reasons for the rule, nonetheless found one of the reasons acceptable—the fear that some inmates might coerce others into signing the petition. Faced with this invocation of prison security rationale, the Court upheld the restriction, finding that First Amendment rights were "touched, but not seriously infringed."

E. No Right of Access to the Press

It should come as no surprise that whenever there is a prison rebellion, one of the key demands is direct access to the news media. Prisoners and prison officials alike know the importance of a free, investigative press in exposing wrongdoing and arousing the public conscience. They seek it and shun it, respectively, for this same reason. In both *Pell* and *Saxbe*, total bans by the prison on face-to-face interviews were upheld by the Supreme Court. When prison officials do permit some reporters access to prisoners, they are free to deny access to others. In *Jersawitz v. Hanberry*,⁶⁶ a journalist who had produced a public access cable television show wished to interview Father Raymond Bourgeois, an outspoken critic of United States foreign policy and imprisoned for civil disobedience. Prison regulations permitted the entry of only those

reporters who worked for media holding an FCC license. The United States Court of Appeals for the Eleventh Circuit upheld the ban, finding that the prison's desire to ensure that the reporters who entered the prison were "responsible persons" who were accountable "to recognized media organizations" was legitimate.⁶⁷

F. Other Restrictions

Even a prisoner who has no desire to obtain, distribute, or even discuss anything objectionable faces grave impediments in pursuing his or her own intellectual star, however innocuous. A plethora of prison regulations, designed to facilitate prison administration, impose formidable restrictions of a prisoner's access to ideas and information.

In *Wolfish*, the Court upheld a rule permitting entry of hardback books only if sent from a publisher, book store, or book club.⁶⁸ In *Wagner*, the district court approved a similar rule for all books and magazines, citing the same justification—administrative time and effort to leaf through every single page.⁶⁹ Going even further, the Third Circuit, in *Hurd v. Williams*,⁷⁰ allowed to stand a rule that required all publications to come only from the publisher.⁷¹

Neither can prisoners expect any privacy in their incoming or outgoing correspondence. In *Jackson v. Norris*,⁷² incoming mail that was not privileged was read by the jail staff. In upholding this practice, the United States District Court for the Middle District of Tennessee refused to require the prison to make any particularized showing that the correspondent or the recipient posed a danger. In *Norris*, the writer was presidential candidate Reverend Jesse Jackson whose letters were read (for escape plans?) by the staff.⁷³ And in *Gaines v. Lane*,⁷⁴ the Seventh Circuit allowed prison officials to read all outgoing correspondence, noting that the regulation was designed to foil the transmission of escape plans or other, unspecified security threats. The certainty of harm did not have to be shown.⁷⁵

There is also no general constitutional right of access to the telephone, at least for calls to persons other than lawyers. In *Benzel v. Grammer*,⁷⁶ the Eighth Circuit upheld a Nebraska regulation that permitted prisoners in the punishment unit to call only three people, two of whom had to be family members, and the third, if not a relative, had to be female. No male non family members could be called. The

Free Speech (cont.)

Eighth Circuit upheld the determination of the prison officials that "male to male" telephone contact served no important rehabilitative value, and posed potential security problems.⁷⁷

G. Two Decades of Supreme Dishonesty

For almost two decades, the Supreme Court and the lower federal courts have created an *apartheid* application of the First Amendment. Perhaps the most striking aspect of the history of prison free speech litigation is the general absence of any genuine First Amendment analysis. There was no acknowledgement in *Martinez*, *Pell*, *Jones*, or *Wolfish* that free speech rights hold some special place in American society or that they fulfill some unique role in the democratic process. To the contrary, the courts have treated such claims, both analytically and rhetorically, in the same way they treated claims that prisoners are entitled to single cells or to conjugal visits. Two centuries of high-minded judicial language about the primacy of the First Amendment is conspicuous for its absence in prison opinions.

It is a truism that the freedom of speech values of the First Amendment have endured and flourished because of their value to *all* individuals and, by extension, to society as a whole. But all of the justifications that have been advanced for free speech guarantees over the ages of American law should apply with equal, if not greater force, to persons in prisons. Prisoners do not value freedom of speech any less than free citizens, nor is the right of any less use to them than to non incarcerated people.

The quest for self-fulfillment, recognized as a central value protected by the freedom of speech guarantees of the First Amendment,⁷⁸ does not end when sentence is pronounced. Given the limitations upon a prisoner's other means of personal advancement, reading, speaking, writing, and painting often become the central focus of daily life. Malcolm X noted:

"I have often reflected upon the new vistas that reading opened to me. I knew right there in prison that reading had changed forever the course of my life. As I see it today, the ability to read awoke inside me some long dormant craving to be mentally alive.... My homemade education gave me, with every additional book that I read, a little bit more sensitivity to the

deafness, dumbness, and blindness that was afflicting the black race in America."⁷⁹

Among others, John Bunyan wrote *Pilgrim's Progress*, Oscar Wilde wrote the *Ballad of Reading Gaol*, and Dr. Martin Luther King, Jr., wrote his *Letters From A Birmingham Jail* while behind bars. Alexander Berkman wrote a political manifesto;⁸⁰ Caryl Chessman exposed the tyranny of the criminal justice system;⁸¹ and Bobby Sands wrote poetry and songs while incarcerated.⁸²

Closely related to personal fulfillment is the First Amendment's protection of the quest for political and social truth, and the concomitant idea that such truth is only discoverable when people are free "to think as they please and ... speak what they think."⁸³ Prisoners have no lesser need for truth than free citizens, nor is truth ascertained differently behind prison walls than across the street from them. The prisoners in *Pittman* no doubt believed the truth of their criticism of penal authorities, as did the plaintiffs in *Vodicka*. Indeed, if one proceeds from the assumption that persons are in prison because they have erred in some way, then granting them the same tools possessed by the rest of us to search for truth is an unquestionable penological good.

Free speech rights are also cherished as a vaccination against tyranny and abuse of governmental power.⁸⁴ Underlying this "checking value" is the well-founded suspicion that every government has a natural tendency to suppress the unpopular and maintain the status quo. Within a prison, the hand of government is far heavier and more frequently involved in one's daily affairs than outside the walls. Prisons, after all, are total institutions with every aspect of life regulated by the state. In *Martin*, the prisoner attempted to warn the public about prison conditions; in *Caruth*, the prisoner wanted to alert the public that the KKK was recruiting. The potential for abuse when one has complete control over other people needs little explanation.

Effective participation in the political process is also dependent upon freedom of speech. While prisoners, by virtue of their own incarceration, sometimes have no access to the ballot box, voting is but one means of participation. Writing, speaking, and seeking to influence public sentiment are activities of equal use to prisoner and free person alike. The prisoners in *Nickens* and *Gunnell* attempted

to petition corrections officials, while the plaintiffs in *Baraldini* maintained their belief in communism and refused to denounce their comrades.

Lastly, freedom of speech has been conceived of as a "safety valve." "Punishing people for speech does not discourage the speech; it only drives it underground, and encourages conspiracy. In the battle for public order, free speech is the ally, not the enemy." If this is true outside the walls, there is no reason to think that the opposite rule applies once sentence is pronounced. Unfortunately, prison wardens have been permitted to proceed from the opposite assumption—that punishing speech will prevent that speech and, accordingly, prevent the realization of the ideas advocated by the speakers.

The courts have never evaluated the importance of free speech rights in light of the values protected by the First Amendment, preferring instead to address the other side of the equations invoking the familiar shibboleths that prisons are difficult places to run, that running them requires the exercise of judgments uniquely suited to corrections officials, and that courts are unsuited to make these determinations. But these arguments cannot withstand analysis.

Running a prison certainly is difficult and dangerous. But this hardly supports the conclusion for which it is invoked. The difficulty of the government's task has never provided a basis for suppressing the free speech rights of the citizenry. Courts, despite two decades of blather about difficult tasks, have yet to articulate the reason why administering three cells in a county jail, for example, is so much more difficult than, say, running the City of New York that the managers of the former should be given vast powers that are denied to the latter. Nor has any evidence appeared in the record of any prison case that proves running a prison is so much more difficult than running a nuclear power plant, the Center for Disease Control, a satellite research facility, or some other enterprise which leaves the free speech rights of its members more or less intact. Of course, when speech raises some grave risk of imminent danger, then and only then is the government free to act, in the narrowest of fashions, to avert that danger. The courts have never explained why a "least restrictive means" test, striking the proper balance between order and rights in the outside world, is unsuited for prison free speech.

Nor have they ever explained why the managers of all prisons and jails are given the same authority to suppress free speech rights, despite obvious differences among institutions that directly affect the difficulty of the task of administration. Some prisons are huge institutions housing thousands of people; others are only a few cells in a municipal building. Some prisons contain maximum-security prisoners serving long sentences for violent crimes, while others house a population of low security, nonviolent offenders who participate in work release programs by day. Many, indeed most, incarcerated persons have not been convicted of anything. Yet the Supreme Court accords exactly the same authority and requires precisely the same deference to the Podunk County Sheriff as it does to the head of the Federal Bureau of Prisons. A prisoner with a perfect record, serving the last weeks of a short sentence in an honor camp can be treated, for First Amendment purposes, the same as a death-row prisoner on the eve of execution.

It also is simply untrue that prison administrators, as such, possess some mysterious expertise that requires deference from the federal courts. Prison administrators differ widely in background, education, skills, and social attitudes. There is no penological consensus that literature "condoning" homosexuality, for example, is dangerous to institutional security. The Kentucky warden in *Espinoza* was more likely motivated by his own prejudices than any generally shared expertise. Indeed, the mayor of New York City recently signed legislation permitting gay and lesbian "domestic partners" of jail inmates the same visitation rights as heterosexual married couples.⁸⁵

And even assuming that prison administrators as a whole do possess training and education different from that of the citizenry as a whole, no court has ever suggested that such training is so far beyond the ken of the federal judiciary that the former are incapable of being understood by the latter. Every day, federal courts deal with the intricacies of everything from giant financial empires to DNA research. They deal with bodies of knowledge far more specialized than that required for an associate's degree in prison management.

The argument that federal courts are unsuited to running prisons also unravels when pulled a bit. In the first instance, protecting the free speech rights of pris-

oners should not require the federal court to "run" the prison. It simply requires the federal court to define and protect the most fundamental right in this country, something the federal courts presumably are suited to do, even in this benighted era.

Of course, sometimes the intransigence or incapacity of the prison administration requires courts to assume responsibility for day-to-day functioning. Federal courts are as unsuited to run prisons as they are to operate public schools, large financial institutions, airlines, newspapers, grocery stores, or bus companies. However, they do end up running such institutions, usually quite capably, when the original managers are unwilling or unable to meet their obligations.⁸⁶

The notion that the judgments of prison administrators are entitled to wide-ranging deference is a concept utterly alien and antithetical to the rest of First Amendment jurisprudence. Prison administrators are the persons who are least likely to be trusted with the power to censor inmates. It is they who feel the lash of prisoners' freedom of speech most keenly; it is they who are called to task when corruption and brutality are exposed. The idea that governors, by virtue of their roles as governors, should have the power to silence the governed is absurd in any other context but penal institutions.

Lastly, if the suspension of First Amendment rights was somehow justifiable because prisons are so unique and so dangerous that some special rule should apply, the free speech rights of all members of the institution, including prison guards, administrators, as well as prisoners, could be suspended or adjudicated under a separate constitutional standard. Not surprisingly, this has not been the case.

In *Curle v. Ward*,⁸⁷ New York's Third Appellate Division applied a "strict scrutiny" standard to a prison regulation prohibiting staff members from belonging to the Ku Klux Klan. The Commissioner of the Department of Correctional Services determined that such membership was a threat to the administration, programming, and security of the institution. In *Curle*, there was no talk of the difficulty of running prisons or of "deference" to a method that "treads too broadly on constitutional" choices.⁸⁸ There was no *Baraldini*-type analysis, permitting prison authorities to take preemptive action based upon organizational affiliations. The difficulty of running the

prison could not permit the abridgement of fundamental rights of guards.

Similarly, in *Babcock v. Michigan Department of Corrections*,⁸⁹ the United States District Court for the Western District of Michigan held that prison administrators could not punish a guard who spoke to the press regarding prison conditions, notwithstanding the contention by the warden that the statements were false, reflected poorly on the department, and caused a security threat. The court held that the guard's "statements concerned potentially illegal drug activity occurring in a publicly funded institution, and the treatment of persons who disclose such activity. These are, by any standard, matters of public concern."⁹⁰ In *Harris v. Evans*,⁹¹ the Eleventh Circuit struck down a prison policy prohibiting staff members from communicating directly with the parole board regarding the merits of any particular case. The prison authorities' invocation of the talismanic phrase "security" left the court in *Evans* unmoved as it held that "citizens who comment on individual parole decisions are offering input on the working of the state's criminal justice system."⁹²

Conclusion

Prison free speech cases demonstrate, in the starkest possible terms, the hypocrisy of the federal judiciary and its high-minded pronouncements when the liberty of the poor and oppressed is at issue. Our prisons are vast warehouses for entire generations of black and Latino youths who are being taught the meaning of power and authority, but most certainly not the meaning of democracy, or the importance of free expression. There is every reason to believe that these youths emerge from prison imbued with the same tolerance for ideas and discourse as the wardens. A frightening thought. ■

The authors are affiliated with the New York-based Center for Constitutional Rights. They have long been active in First Amendment and prisoner-rights cases. Reprinted from Creighton Law Review by PLN with permission.

Endnotes:

1. Colman McCarthy, *Thornburgh's Solution: Lock 'em Up*, Wash. Post, July 13, 1991, at A19.

2. Cal Black's Law Dictionary 1194 (6th ed. 1990) (defining prison as "[a] public building or other place for the ... imprisonment of persons convicted of the more serious crimes, as distinguished from reformatories and county or city jails"; (emphasis added)).

Free Speech (cont.)

3. U.S. Const. amend. I. The First Amendment provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech." *Id.*

4. Stuart J. Taylor, *Locked Up in Jail, Locked Out of Court*, Legal Times, June 24, 1991, at 27.

5. Eugene H. Methvin, *An Anti-Crime Solution: Lock Up More Criminals*, Wash. Post, Oct. 27, 1991, at C1.

6. *Violence Threatens Dream* Atlanta J. & Const., Jan. 20, 1992, at 10; Richard Prince, *The Forgotten Prisoners . . . Hispanics Behind Bars*, Gannett News Serv., Dec. 13, 1992.

7. *National Center on Institutions and Alternatives, Hobbled A Generation: Young African American Males in the Criminal Justice System of America's Cities*: Baltimore, Maryland (1992), cited in 2 *Washington Digest, National Ass'n of Criminal Defense Lawyers* (Nov. 1992).

8. 416 U.S. 396 (1974).

9. *Procunier v. Martinez*, 416 U.S. 396, 404 (1974), overruled by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

10. 393 U.S. 503 (1969).

11. *Martinez*, 416 U.S. at 412.

12. See *infra* notes at 40-44 and accompanying text (discussing *Martin v. Rison*, 741 F. Supp. 1406 (N.D. Cal. 1990), vacated sub nom. *Chronicle Publishing Co. v. Rison*, 962 F.2d 959 (9th Cir. 1992)).

13. 417 U.S. 817 (1974).

14. In the companion case of *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the court upheld a similar blanket ban established by federal authorities. See *Saxbe*, 417 U.S. at 850.

15. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948)). In *Martinez*, the Court noted that the issue before it was not only the First Amendment right of prisoners but also those to whom the correspondence was addressed. Accordingly, it left for another day the issue of "prisoners' rights." The Court in *Pell* heralded the coming of that day.

16. *Id.* Thus, free speech rights are not taken away as part of the punishment imposed by society upon the malefactor. Indeed, although some civil rights are expressly withdrawn from the incarcerated by statute, no penal law has attempted to abrogate freedom of speech as a penalty. It also should be noted that many of those persons behind bars are pre-trial detainees who have been convicted of nothing and cannot be "punished" consistent with the Due Process Clause.

17. *Turner v. Safley*, 482 U.S. 78, 88 (1987). Following *Pell*, the elevated scrutiny suggested in *Martinez* was limited to analysis of restrictions on outgoing correspondence. *Thornburgh v. Abbott*, 490 U.S. 401, 424 (1989), and sometimes not even those. See *Martin*, 741 F. Supp. at 1409.

18. The Court in *Pell*, in a neat piece of constitutional prestidigitation, actually created the opposite of a least restrictive means test for such claims, articulating a sort of "least intrusive rights" test. The fact that prisoners could communicate with the press through the mails led the Court in *Pell* to uphold the ban on face-to-face meetings. *Pell*, 417 U.S. at 827-28.

19. 433 U.S. 119 (1977).

20. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 122-23 (1977). 21. That North Carolina officials regarded a prison labor union as subversive is hardly a surprise, given that State's dismal record toward organized labor generally.

22. 441 U.S. 520 (1979).

23. *Bell v. Wolfish*, 441 U.S. 520, 549 (1979).

24. So efficiently did this quartet of cases demolish the free speech rights of prisoners, the Reagan-Bush court felt the need to address the question only twice, wreaking comparatively minor damage. In *Turner*, the court upheld a flat ban on prisoner-to-prisoner correspondence. And in *Abbott*, the Court ratified the right of prison administrators, already widely recognized by lower federal courts, to censor incoming written materials that threatened the security of the institution.

25. Peter Applebone, *With Inmates at Record High, Sentence Policy is Reassessed*, N.Y. TIMES, Apr. 25, 1988, at A1, C4.

26. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

27. *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan J., concurring).

28. 814 F.2d 1093 (6th Cir. 1987).

29. *Espinoza v. Wilson*, 814 F.2d 1093, 1095 pith Cir. 1987) (emphasis added).

30. *Id.* at 1098-99. Permitting a ban on free expression to stand as long as one of the asserted justifications for it is constitutionally valid hardly promotes honesty and integrity either in the promulgation of regulations or in federal litigation.

31. 608 F. Supp. 1095 (ND. Tex. 1985).

32. *Wagner v. Thomas*, 608 F. Supp. 1095, 1097 (N.D. Tex. 1985) (quoting DALLAS COUNTY JAIL POLICY No. 211.80.41(IV)(A)(7)).

33. 624 F.2d 569 (5th Cir. 1980).

34. *Vodicka v. Phelps*, 624 F.2d 569, 573 (5th Cir. 1980).

35. 594 F.2d 407 (4th Cir. 1979).

36. *Pittman v. Hutto*, 594 F.2d 407, 409 (4th Cir. 1979).

37. In 1989, the Supreme Court in *Abbott* approved such censorship whenever a warden finds that printed material would be "detrimental to security, good order, or discipline of the institution, or might facilitate criminal activity." *Abbott*, 490 U.S. at 403 n.1 & 404 (quoting 28 C.F.R. § 540.71(b) (1988)). Given the practice of the lower federal courts, the decision in *Abbott* broke little new ground.

38. Prison administrators have a wide variety of means to punish prisoners who violate institutional rules. These include (1) limitation or suspension of mail, telephone, commissary, and recreational privileges; (2) isolation in solitary confinement for anywhere from a few days to decades; (3) transfer to a more "secure" facility or to a more restrictive department within the prison; and (4) loss of statutory "good time." Depending on the jurisdiction, every day of good behavior can reduce a sentence by as much as one day. Hence, loss of all good time can effectively double the sentence that a prisoner actually must serve and, accordingly, is considered by staff and prisoners alike as one of the harshest punishments. And any institutional infraction could affect a prisoner's parole.

39. 683 F.2d 1044 (7th Cir. 1982).

40. 12741 F. Supp. 1406 (N.D. Cal. 1990).

41. *Martin v. Rison*, 741 F. Supp. 1406, 1410 (N.D. Cal. 1990), vacated sub nom. *Chronicle Publishing Co. v. Rison*, 962 F.2d 959 (9th Cir. 1992).

42. *Id.* at 14. According to the district court, heightened scrutiny under *Martinez* was not required because the ideas did not just exit the institution, they also returned through the newspaper. *Id.* at 1412.

43. *Id.* at 1414-15. These harms included creating a danger of threats of violence, focusing attention on an individual prisoner which could lead to unrest, creating fear on

the part of the staff that their statements might be reported, encouraging a prisoner to be more loyal to his paper than to the prison, and preventing a prisoner from becoming too well known, which could result in his having disproportionate influence in prison. *Id.* There was evidence that the "prison staff was upset about the article." *Id.* at 1415.

44. Other facts that would, in any other context, have called into question the sincerity of the prison in even-handed application of prison rules were that two other federal prisoners had written under by-lines but were not punished, and that Martin had written about eighteen prior articles for the *San Francisco Chronicle*, that were published as regular Sunday features. Martin's writings were known to some prison authorities and cited favorably in his parole file. *Id.* at 1420.

45. 638 F. Supp. 1019 (D. Mass. 1986).

46. *Scarpa v. Ponte*, 638 F. Supp. 1019, 1020 (D. Mass. 1986) (footnote omitted).

47. 779 F.2d 1040 (5th Cir. 1986).

48. *Gibbs v. King*, 779 F.2d 1040, 1045 (5th Cir. 1986), cert. denied, 476 U.S. 1117 (1986).

49. 713 F.2d 1003 (3d Cir. 1983).

50. *Hadden v. Howard*, 713 F.2d 1003, 1006 (3d Cir. 1983) (citing P.A. CODE § 95.102a(b)(25), (31)).

51. 691 F. Supp. 432 (D.D.C. 1988).

52. *Baraldini v. Meese*, 691 F. Supp. 432, 445 (D.D.C. 1988), *rev'd sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989). The conditions of the Lexington HSU and the effect they had on the women confined there was documented by film makers Nina Rosenblum and Alexandria White in the Public Broadcasting Network film *Through The Wire*.

53. *Baraldini*, 691 F. Supp. at 445.

54. *Baraldini v. Thornburgh*, 884 F.2d 615, 620 (D.C. Cir. 1989).

55. 622 F.2d 967 (8th Cir. 1980).

56. *Nickens v. White*, 622 F.2d 967, 971-72 (8th Cir.), cert. denied, 449 U.S. 1017 (1980).

57. *Jones*, 433 U.S. at 132 (1977).

58. *Baraldini*, 884 F.2d at 618.

59. 598 F. Supp. 607 (D.R.I. 1984).

60. *Dooley v. Quick*, 598 F. Supp. 607, 611 (D.R.I. 1984), *aff'd*, 787 F.2d 579 (1st Cir. 1986).

61. *Id.* at 612. Prison officials are also free to curtail discussions among prisoners while they are in the mess hall, prison corridors, and working. See *Lamar v. Coffield*, 353 F. Supp. 1081, 1082, 1084 (S.D. Tex. 1972).

62. 482 U.S. 78 (1987).

63. *Turner*, 482 U.S. at 91.

64. 729 F.2d 362 (5th Cir. 1984).

65. *Adams v. Gunnell*, 729 F.2d 362, 365 (5th Cir. 1984).

66. 783 F.2d 1532 (11th Cir. 1986).

67. *Jersawitz v. Hanbury*, 783 F.2d 1532, 1534 (11th Cir.), cert. denied sub nom. *Jersawitz v. Noonan*, 479 U.S. 883 (1986).

68. *Wolfish*, 441 U.S. at 550-51.

69. *Wagner*, 608 F. Supp. at 1102.

70. 755 F.2d 306 (3d Cir. 1985).

71. *Hurd v. Williams*, 755 F.2d 306, 308 (3d Cir. 1985).

72. 748 F. Supp. 570 (M.D. Tenn. 1990).

73. *Jackson v. Norris*, 748 F. Supp. 570, 573 (M.D. Tenn. 1990), *aff'd*, 928 F.2d 1132 (6th Cir. 1991).

74. 790 F.2d 1299 (7th Cir. 1986).

75. *Gaines v. Lane*, 790 F.2d 1299, 1304 (7th Cir. 1986). The Court in *Gaines* upheld the regulation under the *Martinez* elevated scrutiny standard. *Id.* See *Burton v. Nault*, 902 F.2d 4, 5 (6th Cir.) (allowing prison officials to read outgoing mail, even if privi-

leged, to learn whether drug use played any role in a prisoner's unsuccessful suicide attempt), cert. denied, 111 S. Ct. 198 (1990).

76. 869 F.2d 1105 (8th Cir. 1989).

77. So much for Damon and Pythias.

78. See Martian H. Redish, *The Value of Free Speech*, 130 U. Pa. L. REV. 591, 593 (1982).

79. Alex Haley & Malcom X, *The Autobiography of Malcolm X* 179 (1965).

80. See Alexander Berkman, *Prison Memoirs Of An Anarchist* (2d ed. 1920).

81. See Caryl Chessman, *Cell 2455, Death Row* (1954).

82. See Skylark Sing *Your Lonely Song: An Anthology of Prison Writings of Bobby Sands* (1982).

83. Mary H. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio*, in *Essays in History and Political Theory of Charles Howard McIlwain* 212-13 (1936). See *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (stating that the First Amendment "safeguard[s] . . . the[] rights to the ends that men may speak as they think on matters vital to them").

84. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.6, at 940 (4th ed. 1991).

85. *N.Y. Newsday*, Jan. 27, 1993, Part II, at 50. The legislation went into effect on March 3, 1993, and applies to all 20,000 persons, mostly pretrial detainees, in New York City jails.

86. Actually, federal courts have shown themselves to be quite good at running prisons. Throughout the 1970s, numerous prisons and jails were placed into federal receivership, and run by the federal courts, because they were unable to meet the constitutionally minimum standards of health, safety, and dignity required by the Eighth Amendment. The termination of those receiverships in the 1980s says more about the lowering of constitutional standards than it does about the upgrading of prison administrations.

87. 399 N.Y.S.2d 308 (N.Y. App. Div. 1977).

88. *Curie v. Ward*, 399 N.Y.S.2d 308, 312 (N.Y. App. Div. 1977), modified, 389 N.E.2d 1070 (N.Y. 1979).

89. 1990 U.S. Dist. LEXIS 3644 (W.D. Mich. Apr. 2, 1990) (unpublished decision).

90. *Babcock v. Michigan Dep't of Corrections*, 1990 U.S. Dist. LEXIS 3644, at 7 (W.D. Mich. Apr. 2, 1990) (unpublished decision).

91. 920 F.2d 864 (11th Cir. 1991).

92. *Harris v. Evans*, 920 F.2d 864, 867 (11th Cir. 1991).

Jail Detainee Entitled to Hearing

In 1986 Vincent McCann was a pretrial detainee in the mental health unit at the Orange County Correctional Facility (jail) in New York. A detainee complained to jail guards that other prisoners had thrown urine on him and were taunting him. After a cursory investigation McCann and several other detainees were locked in their cells and infracted. McCann filed suit claiming that his rights to due process were violated when he was locked in his cell and no disciplinary

hearing was held to contest the punishment imposed. After a bench trial the court found largely in McCann's favor.

The court gave an extensive discussion of New York state laws and the jail rules dealing with the administrative and disciplinary confinements of jail detainees and state prisoners. Any New York state prisoner litigating these issues should read the case because it gives numerous case citations fact specific to New York. The court held that McCann had a due process liberty interest enforceable by § 1983 to avoid the imposition of "keep lock" (segregation) without a due process hearing. The court rejected the defendants claim that because McCann was released within 24 hours he was not entitled to a hearing. The court held "...McCann was entitled at least to notice of the reasons for the keep lock and some meaningful opportunity to be heard with respect thereto. In consequence I conclude that McCann was deprived of his right to due process of law in that neither the state regulations then governing county jails nor the OCCF Rules provided for him to make any statement to the officer in charge of his confinement...."

The court found that McCann's keep lock placement was both punitive and administrative in nature but that under the circumstances he could have been placed in keep lock solely for administrative reasons thus the fact that he was not afforded a hearing after the fact was immaterial. The court held that McCann suffered a constitutional deprivation when placed in keep lock because he was not advised of his right nor given an opportunity to make a statement to the jail lieutenant responsible for his segregation. The court awarded McCann \$50 in damages and entered judgment in his favor. See: *McCann v. Phillips*, 864 F. Supp. 330 (SD NY 1994). ■

NC DNA Testing Statute Upheld

Past issues of *PLN* have reported on the legal and political issues involved in DNA testing. Several states and the federal government have passed laws in the last five years which mandate the taking of blood from prisoners in order to compile a DNA database of convicted felons. So far all legal attempts in state and federal courts challenging these statutes have failed.

In 1993 the North Carolina legislature passed legislation authorizing the State

Bureau of Investigation (SBI) to establish and maintain a data bank with DNA samples of certain felons. Only law enforcement agencies can access the information during an official investigation or with a court order. The DOC is the party responsible for collecting the actual blood samples.

North Carolina prisoners filed a class action suit challenging both the constitutionality of the statute and the fact that the DOC was using excessive force to collect blood samples from prisoners who refused to provide them voluntarily. The force used consists of a gang of guards spraying prisoners with mace, jumping on the prisoner, holding his arm in painful positions and taking the blood sample. The suit claimed that the statute violates the fourth amendment because the samples are taken without regard for individualized suspicion or probable cause.

The court considered and rejected each of the claims raised. It noted that *Jones v. Murray*, 962 F.2d 302 (4th Cir.1992) had upheld a similar Virginia statute. Being bound by the *Jones* ruling, the court rejected the fourth amendment claims. Considering the eighth amendment claims, the court held there were no facts or allegations in the case that the force used to collect the DNA samples was applied with the intention of harming the prisoners. Because the statute is constitutional it can lawfully be enforced by prison officials, including by the use of force and violence. The court noted that this does not mean that prison officials can use excessive force but only that amount needed to ensure compliance with the statute.

The prisoners had also claimed that the statute violated the state constitution. Because the federal claims were dismissed the court held it lacked jurisdiction to hear the state law claims as well. The case was dismissed in its entirety. Given the track record to date it does not appear that any federal court is likely to overturn DNA collection and testing statutes. In the December, 1994, issue of *PLN* we reported that the recently passed federal crime bill mandated the creation of standardized DNA data banks by the states. That will ensure that all 50 states will soon have either statutes or administrative regulations mandating the collection of blood samples for these DNA data banks. We encourage readers to keep us advised of litigation on this issue. See: *Sanders v. Colman*, 864 F. Supp. 496 (ED NC 1994). ■

IL DOC Confinement Policy Illegal

The director of the Illinois DOC (IDOC) has promulgated a regulation under which all prisoners that it receives must be held for at least 60 days before they are released. Ronald Rooding was convicted and sentenced to one year in jail. After deducting good time and earned time he should have served a total of 92 days in confinement. When he was transferred from the Cook County jail to an IDOC facility he had 21 days remaining to serve. Instead, the IDOC calculated his release at 60 days after he arrived in their custody. A week after he should have been released he filed a writ of habeas corpus in Cook County Circuit Court. The court granted the Writ and issued an order directing Rooding's immediate release from custody. The court denied the state's motion for reconsideration and refused to stay its ruling pending an appeal. Despite the fact that the court had granted the writ on December 22, 1993, Rooding was not released until January 6, 1994, the day after a state appeals court denied an emergency motion to stay the lower court ruling.

Rooding then filed suit in federal court under 42 U.S.C. § 1983 claiming that his federal rights to due process and equal protection were violated when he was held past his release date. The state filed a motion to dismiss the suit which the district court denied.

Because Rooding is no longer in custody § 1983 represents his sole federal remedy for the violation of his federal rights by state officials thus he need not initiate the action as a habeas corpus petition. The state argued that the equal protection claim must be dismissed because Rooding did not plead discriminatory intent. The court held that the state's argument was collaterally estopped because Rooding had already presented this issue in state court and prevailed on it. Collateral estoppel prevents the re-litigation of issues already decided between the parties. The court held that even if collateral estoppel did not apply that Rooding had sufficiently stated an equal protection claim. Rooding claimed that the IDOC policy discriminated against prisoners who served their sentences in non-IDOC facilities as opposed to those who served their entire sentence in an IDOC facility. Rooding claimed that his due process

rights were violated when he was arbitrarily deprived of his good time credits without a hearing. This too adequately stated a claim for relief.

Analyzing 730 ILCS 5/3-6-3 (a)(2), the state's good time statute, the court held that it creates a due process liberty interest when it states that Illinois prisoners will receive one day of good time credit for each day served unless the prisoner is serving a sentence of natural life. Turning to ILCS 5/3-6-3(a)(3) which gives the IDOC director discretion to award up to 180 days of good time for "meritorious conduct" the court held that it does not create a liberty interest on its face. The court did not dismiss the claim premised on section (a)(3) of the statute because in *Hamilton v. O'Leary*, 976 F.2d 341 (7th Cir. 1992) the appeals court held that all of 730 ILCS 5/3-6-3 is a state created entitlement to good time credits enforceable under § 1983 as a due process liberty interest. Under *Durso v. Rowe*, 579 F.2d 1365 (7th Cir. 1978) a "plaintiff must be given an opportunity to prove that as a matter of practice, prison officials did not revoke one's work-release status absent a rule violation. If the allegation is established, the plaintiff has been denied his right to due process." The court held that this was sufficient authority for Rooding's claim to survive a motion to dismiss.

Rooding sought declaratory and injunctive relief to the effect that the IDOC policy was unconstitutional on its face. The court dismissed the equitable relief claims because Rooding was no longer in custody and would not be affected by the policy. This means that each Illinois state prisoner affected by the practice can file suit and collect money damages on an individual basis as long as the policy is in effect.

The court denied Rooding's motion to convert the case into a class action suit. The court held that prisoners still in custody affected by the policy must individually file writs of habeas corpus because such a ruling, affecting the length of their sentence, cannot be brought under § 1983. See: *Preiser v. Rodriguez*, 411 US 475, 93 S.Ct. 1827 (1973) and *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

The defendants moved for qualified immunity, claiming that Rooding's rights to due process and equal protection were not so well established as to give them reasonable notice that their actions were unconstitutional. The court disagreed,

citing several Illinois state cases which forbid the discriminatory classification of prisoners. The court held these cases were sufficient to put the defendants on notice that their conduct was illegal. Thus, they were not entitled to qualified immunity and would have to pay money damages if any were awarded. See: *Rooding v. Peters*, 864 F. Supp. 732 (ND IL. 1994). ■

Court Clerk Suable

Don Curry is an Illinois state prisoner who was convicted of sexual assault in 1990. He filed a notice of appeal in the county court. Illinois law requires, upon receipt of a notice of appeal, that the circuit court clerk prepare and deliver a copy of the record on appeal to the reviewing court and on request to the appellant. State court rules list 15 items that must be included in the appeal record.

Aurelia Pucinski was the court clerk who processed Curry's appeal record and sent it to his attorney. Curry claimed that the record sent did not include important items required by the court rules. Curry sought production of his court record by filing a state Freedom of Information Act request which was unsuccessful. After his conviction was affirmed he filed suit against Pucinski pursuant to 42 U.S.C. § 1983 claiming that she had violated his right of access to the courts by not providing him with the requested court materials.

Pucinski filed a motion for summary judgment which the district court denied. The court notes that prisoners have a constitutional right of meaningful access to the courts. *Allen v. Duckworth*, 6 F.3d 458 (7th Cir.1993) held that arbitrary deprivations of a state granted appeal right violates due process as does excessive delay in hearing the appeal, including delays in furnishing the transcript or record needed for an appeal. Thus the constitution "speaks not only to wardens charged with regulating prison libraries but also to clerks responsible for providing inmates access to their files requiring that the handling of those important records be free from arbitrary interference and unreasonable delay. Where the constitutional violation is 'minor and incidental' an inmate must show prejudice a requirement that is waived where the restriction is 'direct substantial and continuous.'"

The court held that Curry had created a genuine issue of material fact as to whether several critical documents were incorporated into his record on appeal. The court notes that some of the allegedly excluded documents have been found to constitute reversible error in other cases. The court recognized the speculative nature of Curry's allegation. "But that problem is inherent in the nature of Pucinski's omission. If in order to survive a threshold summary judgment, Curry were required to identify the arguments that he could have made based on documents that Pucinski failed to deliver. Curry would be embroiled in a Catch-22 dilemma: How can he do so until Pucinski provides the missing documents so he can review them? Pucinski cannot thus bootstrap herself into a Rule 56 victory by reason of her own delinquency."

The court held that Pucinski was not entitled to eleventh amendment immunity because she was sued for damages in her personal capacity and she was not entitled to absolute immunity because her functions were not so intricately tied to the judicial process as to warrant absolute immunity. Analyzing the role of court clerks the court notes that the duties involved were designed to be purely ministerial and involve no exercise of judgment or discretion by the clerks. "In performing such a non-discretionary function, Pucinski was disentitled to any mantle of absolute immunity and is subject to suit in her personal capacity."

Pucinski is also subject to suit in her official capacity solely for injunctive relief (the eleventh amendment bars suing government employees in their official capacities for money damages. The court denied Pucinski's motion for summary judgment and scheduled the case for trial. See: *Curry v. Pucinski* 864 F. Supp. 839 (ND IL. 1994). ■

PI Granted to Satanist

Robert Howard is a federal prisoner at FCI Englewood in Littleton, CO. He is also a Satanist. Howard made several requests to prison officials seeking to practice satanic rituals. Prison officials denied his requests and Howard filed suit claiming that the denial of his requests violated his first amendment rights. After a lengthy hearing the district court granted a Preliminary Injunction (PI) to allow Howard to practice his rituals until the suit is resolved on the merits.

While dealing with a specific religious faith, Satanism, this ruling contains numerous points of law and fact which would be useful to anyone litigating a free exercise of religion claim.

Readers should note that this is not a ruling on the merits but a preliminary ruling designed to protect Howard's rights until the matter is resolved. Plaintiffs seeking a preliminary injunction must show there is a substantial likelihood they will prevail on the merits; that they will suffer irreparable injury unless the injunction is issued; the threatened injury outweighs whatever damage the proposed injury may cause the opposing party and the injunction, if issued, would not be contrary to the public interest. In its ruling the court focused on the likelihood of success on the merits.

The court gave extensive factual background for the basis of its ruling. The three rituals that Howard seeks to perform as part of his Satanic religion involve using candles, incense, a gong, black robe an object for pointing. The space required for a one hour, monthly ritual, was very small. Howard characterizes himself as a humanistic Satanist and emphasized that none of his beliefs involve bloodletting rituals, animal sacrifices or violence. He is not a member of the Church of Satan, which is a recognized faith.

To determine if the first amendment applies to the case the court first had to determine whether Satanism is a religion and whether Howard's beliefs are sincerely held. The court did not reach the question of whether Satanism is a religion because the parties did not dispute that it was. The Bureau of Prisons (BOP) treats Satanism as a religion. The court held that Howard's Satanic beliefs were sincerely held despite the BOP argument that they were not because he had attended other religious ceremonies. The court noted that attending other religious services does not prove the insincerity of a professed belief and noted that the prison chaplain, a Catholic, admitted attending numerous religious services of other faiths.

Having addressed the threshold issues the court proceeded to analyze the constitutionality of the BOP's total denial of Howard's request to practice Satanism under the *Turner v. Safley*, 482 US 78, 107 S. Ct. 2254 (1987) "reasonableness" standard. Prisoners retain the constitutional right to the free exercise of religious beliefs. Any rules which limit first

amendment rights must be content neutral even though courts will uphold such rules if they achieve legitimate correctional goals such as prison security, order, rehabilitation, etc.

The court rejected the BOP's claims that the ban on Satanic practices was related to security because all of the items that Howard had requested to use in Satanic rituals were already used in other religious services including a gong used by Hare Krishna prisoners at the prison. No security threat had been shown from the use of these items by other prisoners and nothing indicated that Howard was a greater security threat than other prisoners. The BOP claimed that Howard's safety would be endangered if other prisoners learned of his Satanic beliefs but the court discounted this after hearing evidence that Howard is public in his satanic beliefs and practices and has experienced no animosity as a result. At least not from his fellow prisoners.

The BOP argued that the tenets of Satanism were contrary to the goals of rehabilitation and thus could not be allowed. The court rejected this claim by noting that as a result of the evidence and literature presented at the hearing it was not clear that this was the case and characterized Satanism as "an extreme version of the 'eye for an eye, tooth for a tooth,' philosophy." Moreover, Howard had not advocated an extreme or violent practice of Satanism.

The court distinguished this case from *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989) and *Childs v. Duckworth*, 705 F.2d 915 (7th Cir. 1983) where circuit courts upheld the denial of prisoners' right to practice Satanism in prison. The court noted that in those cases security issues predominated in large part because the plaintiffs advocated extreme practices such as blood letting and flesh eating. In this case nothing that Howard seeks to do is banned by any prison regulation other than the ban on Satanism per se. "He is asking for the same privileges granted to every other religious group. In view of this, I cannot help but conclude that some of the security concerns expressed by prison of officials are pretextual."

The BOP claimed that allowing Howard a Satanic medallion and literature was sufficient. The court disagreed noting that rituals are an essential part of many religious faiths and that Satanic rituals are entitled to equal protection as are other faiths. By not being allowed to

PI Granted (cont.)

perform rituals, Howard was being denied an opportunity to practice his faith, rather than just have it.

The court gave a lengthy analysis to the effects that accommodating Howard's beliefs would have on prison and BOP resources and concluded that any impact would be insignificant. The court noted the extensive religious program already in place at Englewood which already accommodated Christians, Rastafarians, Muslims, Jews, Buddhists, Hare Krishnas, Native American faiths, etc. Prison officials claimed they were understaffed and could not maintain prison security and allow Howard to practice his religion. "This is a proper concern, but once again it seems to be a selective one. Despite staffing limitations, the prison officials were somehow able to accommodate the single Hare Krishna prisoner who wished to perform his religious rites... No evidence has been presented to this court to permit the inference that allowing plaintiff to practice his rituals would be more of a drain on prison resources than supervising the ceremonies performed by the one Hare Krishna inmate."

In granting the PI the court held that Howard would suffer irreparable injury if the PI were not granted because money damages alone could not adequately compensate for the damages caused by the ban on satanic practices. The court held that the BOP would not be harmed or prejudiced by the PI and that it was not against the public interest to issue the PI.

The court was clear that his ruling does not mandate allowing prison officials to accommodate every form of Satanism. The injunction forbids the BOP from enforcing its administrative policy which forbids the use of prison time and space for the performance of satanic rituals. BOP officials at Englewood were ordered to provide Howard with the implements needed for his rituals that are provided to other faiths at the prison, i.e. candles, incense, gong, chalice, black robe and object for pointing. If no prison funds are expended on such items but are bought by the prisoners themselves or outside groups, Howard must be allowed to do the same. Prison officials are allowed to place reasonable time, place and manner restrictions on the performance of the rituals. In closing, the court quoted judge

Cudahy's dissent in *Childs*, "We should not lightly conclude that because of its content, Satanism is to be denied the full protections of the first amendment... We ought to give the devil his due." See: *Howard v. United States*, 864 F. Supp. 1019 (D CO. 1994).

[Editor's Note: The ruling in this case received a wide variety of media coverage, all of it negative, which tried to paint prisoner litigation as being ludicrous or frivolous. Indeed, I thought that was the case myself and this is after almost five years of reading every single published prison case for PLN. But Judge Nottingham gave an excellent and well reasoned opinion that sets forth not only the factual basis for his ruling but the legal basis as well. Namely, that the First amendment protects unpopular and minority held religious beliefs as well as those of the majority. Moreover, it is clear that the issue involved was not "prison security" but the BOP's favoritism to more established religious faiths rather than a policy of equal treatment. Anyone interested in media bias should compare the treatment of the case in the media with what the ruling actually says. That is why we read the full text of all rulings we report in PLN.] ■

Disciplinary Evidence Must be Reliable

Michael Walsh is a New York state prisoner. He was infraacted for allegedly exposing himself to and threatening a prison guard. At the disciplinary hearing, Walsh called as a witness another guard who had co-signed the infraction report. The guard testified that she was present on the occasion and did not see Walsh expose himself nor hear him threaten the other guard. Despite this, the hearing officer found Walsh guilty and sentenced him to six months in segregation and a loss of privileges. Walsh administratively appealed the hearing result and it was overturned due to the conflicting evidence at the hearing. Walsh then filed suit in federal court seeking money damages. He claimed that his right to due process was violated when he was found guilty of an infraction when contrary evidence was presented at the hearing.

The defendants moved for summary judgment on all the issues. The district court discussed the relevant standards

that courts apply when reviewing prisoners' civil rights claims arising from disciplinary hearings. Courts must only determine if "some" evidence supports the hearing committees finding of guilty, in practice this has come to mean 'any' evidence. Thus, exculpatory evidence is irrelevant because "although it presumably could have allowed the disciplinary board to reach a contrary conclusion, it would not have nullified the evidence of guilt on which the board relied." Once a court determines that the evidence supporting a disciplinary hearing is reliable, its review ends. Reviewing courts are not to determine whether evidence in the record would support a contrary conclusion.

Applying these principles to the case at bar, the court held that nevertheless, the hearing committees finding of guilty was not supported by the evidence. The guard who had co-signed the infraction undermined its reliability by testifying at the hearing that she did not see Walsh expose himself or threaten the other guard. Thus, Walsh's due process rights were violated by the fact that the hearsay evidence admitted against him (the infraction report) was not reliable. The court denied the defendants summary judgment on this issue.

The court granted the defendants qualified immunity from money damages holding "...the defendant was not placed on notice that any disciplinary finding based on tainted evidence (i.e. an unreliable misbehavior report) constituted a violation of the plaintiff's due process rights." Because neither the supreme court nor the second circuit had held that tainted evidence does not meet the 'some evidence' standard approved by those courts. See: *Walsh v. Finn*, 865 F. Supp. 126 (SD NY 1994). ■

Harassing Searches State Claim

Astorinus Burton is an Illinois state prisoner. He filed suit under 42 U.S.C. § 1983 claiming that after he filed administrative grievances against prison guards who used racist slurs against him he was subjected to a widespread campaign of harassment and retaliation by the guards. This included guards opening and reading his legal mail, destroying his property in front of him, subjecting him to daily strip searches and shakedowns and punching him in the stomach. The defendants

moved for summary judgment which the court denied on most claims.

The court dismissed the prison warden as a defendant because there was not sufficient evidence to show that he was aware of the actions by his subordinates. The court then discussed the claims against the remaining defendants.

The court held there was more than ample evidence to support Burton's claims that he was punched in the stomach by one of the defendant guards. The court held that the guard calling Burton a "nigger" and stating he would "kick [his] ass" was sufficient to show a malicious intent to inflict harm rather than to maintain or restore order and discipline in prison. Even though Burton did not suffer any permanent injury the court held that he had stated a claim of sufficient gravity to submit to a jury for resolution. Ample discussion was given for the legal standards applicable to prisoners' excessive use of force claims.

Burton claimed that during the searches of his cell the defendant guards opened and read his legal mail to and from his attorney discussing his criminal appeal. While doing this in front of him the guards taunted him about the letters contents. The documents were plainly marked as being legal in nature. The court noted that numerous circuit cases have held that is unconstitutional for prison guards and employees to read prisoners legal mail to and from their attorneys. Thus, this claim would be submitted to a jury as well.

While strip searches of prisoners are permitted and can be done for any reason or no reason at all they must be conducted in a reasonable manner. Burton claims that he was subjected to strip searches on a daily basis and taunted and harassed during the searches themselves by the defendants. He claims the sole purpose of the searches was to torment and harass him. This claim survived summary judgment and will be submitted to a jury as well because the defendants completely denied that any strip searches were conducted at all. "Because the frequency of repetition (wholly unjustified by any positive results from prior searches) strongly supports the notion that the searches were in no way connected to any legitimate prison administration objective, such forced chronic strip and body cavity searches are fairly construed as unacceptable torment, especially when coupled with the guards' admissions that

searches of that nature are proscribed by prison policy."

The court also denied the defendants summary judgment on the retaliation claims by noting that retaliating against prisoners who complain of mistreatment by prison officials or guards violates the first amendment. The court held Burton had introduced sufficient evidence to warrant submitting the claims to a jury for resolution. See: *Burton v. Kuchel*, 865 F. Supp. 456 (ND IL 1994). ■

Retaliatory Threats Illegal

Leon Burgess is a Missouri state prisoner. Burgess disrupted a prison disciplinary hearing and guards responded by holding him down, while he was handcuffed, as another guard tried to force a towel into his mouth. When that failed the guard wrapped the towel around Burgess' neck and choked him into unconsciousness while screaming racial slurs. The prisons' associate superintendent was present, witnessed the assault and did nothing. Burgess filed an administrative grievance over the assault and prison officials threatened him with retaliation if he did not drop the complaint. Burgess filed suit in federal court under 42 U.S.C. § 1983 claiming that the choking violated his eighth amendment right to remain free from cruel and unusual punishment and the threat violated his first amendment rights. The district court granted summary judgment to prison officials on all counts, dismissing the suit.

The court of appeals for the eighth circuit affirmed in part, reversed in part and remanded the case to the lower court for trial. The appeals court held that summary judgment was inappropriate in this case because there were disputed issues of material fact. The dispute arose when the prison official defendants completely denied, under oath, choking or threatening Burgess. Burgess submitted both his complaint and an affidavit under penalty of perjury and the appeals court held that the lower court erred by discounting the documents.

Considering Burgess' affidavit and complaint the court held that a genuine issue of fact had been created as to whether the incident had occurred. Burgess' allegations were sufficient to state a claim under the eighth amendment. "Because we must credit Burgess's assertions

for summary judgment purposes, we believe a jury could reasonably find the corrections officers went beyond a good faith attempt to restore order and acted with a malicious and sadistic desire to inflict harm. A choking that produces virtual unconsciousness and great pain is not trifling for eighth amendment purposes." The court held that a jury could reasonably find the associate superintendent liable for not intervening thus summary judgment in his favor was also improper.

The lower court also erred in dismissing the first amendment claims because Burgess had not shown a distinct injury from the threat. The appeals court held that "a threat of retaliation is sufficient injury if made in retaliation for an inmate's use of prison grievance procedures." The court affirmed dismissal of Burgess's conspiracy claims and dismissal of several defendants not directly involved. See: *Burgess v Moore*, 39 F.3d 216 (8th Cir. 1994). ■

DA Liable for Preventing Court Appearance

Tobin Lemmons is an Oklahoma state prisoner. While in jail he filed a workers' compensation complaint against his former employers with the aid of an attorney and law firm he hired for this purpose. On two occasions in 1991 the state judge before whom the compensation claim was pending issued writs of habeas corpus ad testificandum to secure Lemmons's presence in court so he could testify. On each occasion Tulsa County Assistant District Attorney Denise Graham intervened and prevented execution of the writ. Lemmons's suit has languished ever since. Lemmons filed suit under 42 U.S.C. § 1983 against both his attorney and Graham. The district court granted Lemmons *in forma pauperis* then, on its own motion, dismissed the suit as being legally frivolous stating that Lemmons could not establish federal jurisdiction for his malpractice claim against his attorney and Graham was entitled to absolute immunity.

The court of appeals for the tenth circuit affirmed in part, reversed in part and remanded the case for further proceedings. The court affirmed dismissal of the claims against the attorney because while Lemmons may be able to pursue a malpractice suit against him in state court there

DA Liable (cont)

was no state action to give rise to a §1983 claim.

Turning to the claims against Graham the court held that Lemmons had stated a claim for violation of his right of access to the courts and that even if he was not entitled to monetary damages he could still seek declaratory and injunctive relief. The court gave a detailed discussion of the relevant law on prosecutorial immunity and notes that it shields only those activities "intimately associated with the judicial process such as initiating and pursuing a criminal prosecution." Administrative and investigative functions by prosecutors are only protected by qualified immunity. Analyzing the claims against Graham the court held these could be best characterized as administrative in nature because Lemmons had already been convicted, thus she was only entitled to qualified immunity.

Because qualified immunity is an affirmative defense which must be raised and proven by the defendant it had to be raised by the defendant and would have to be resolved on remand. The court noted that regardless of whether Graham was entitled to absolute or qualified immunity from money damages she and all prosecutors are still subject to suit for equitable relief. "A prosecutor may not simply raise the shield of official immunity and continue to act in an unconstitutional manner without fear of judicial orders to the contrary." "A plaintiff may therefore seek injunctive relief to guard against continuing (or future) governmental misconduct. As Mr. Lemmons in fact asks for such relief, assertions of immunity, even if valid, cannot dispose of his complaint."

The district court also based its dismissal on the fact that prisoners do not have a right to attend civil trials. The appeals court agreed with that premise but held that it misconstrued Lemons' claim. His claim did not hinge on the existence of a right to attend his trial but the fact that the writ of habeas corpus ad testificandum granted by the state court "in and of itself granted Mr. Lemmons the legal right to appear in court." Graham's interference with this right is the cause of action.

The court also discussed prisoners' right of meaningful access to the courts and the power of courts to compel the attendance of prisoners at civil trials. The court could find no legal basis for a dis-

trict attorney to interfere in the granting of a writ of habeas corpus. "We again find it at least arguable that continued imprisonment of a petitioner in the face of a validly issued state writ of habeas corpus, in the absence of any justification or excuse, violates a prisoner's constitutional rights."

While district courts retain considerable discretion in granting or denying indigent litigants the ability to proceed *in forma pauperis* that discretion is not unlimited. "An *in forma pauperis* plaintiff no less than a party who pays court costs, can state claims based upon facts that are in dispute or legal theories that are as yet speculative.... Factual allegations need merely be plausible, and legal bases must only hold some arguable merit." The court remanded the case to the lower court for further proceedings. See: *Lemmons v. Law Firm of Morris and Morris*, 39 F.3d 264 (10th Cir. 1994). ■

Prison Worker Compensation Law No Bar to *Bivens*

Lozen Bagola is a federal prisoner. He filed a *Bivens* suit against Bureau of Prisons (BOP) officials claiming that he lost his right hand when he was forced to operate prison machinery that officials knew to be unsafe. He claimed that BOP officials knew of the faulty machinery and took no steps to repair it thus showing deliberate indifference to his eighth amendment rights. The district court dismissed the suit as being legally frivolous under 28 U.S.C. § 1915(d). The court of appeals for the seventh circuit reversed and remanded.

The lower court had held that 18 U.S.C. § 1426, a federal prison worker's compensation statute, did not preclude *Bivens* suits against prison officials, but that it did provide the exclusive remedy for tort suits against the government. The appeals court affirmed this holding. "Section 1426 contains no specific provisions that abrogate the right to sue other prison employees. Thus, neither this statute nor the Federal Tort Claims Act, which specifically permits constitutional tort actions against Government employees, 28 U.S.C. § 2679(b)(2), bar Bagola's *Bivens* action against prison officials."

Analyzing the factual sufficiency of Bagola's lawsuit the appeals court held that he had adequately stated a claim for

an eighth amendment violation. "By repeatedly stressing the danger of his prison employment, Bagola sufficiently alleges the objective requirement 'that he is incarcerated under conditions posing a substantial risk of serious harm.'" After the appeal was filed Bagola provided the court with evidence of another amputation four months prior to his own injury. "We may consider such evidence in determining the frivolousness of his complaint." Citing *Highsmith v. Chrysler Credit Corp*, 18 F.3d 434, 439 (9th Cir. 1994) for the proposition that courts reviewing dismissals for failure to state a claim "will consider new factual allegations raised for the first time on appeal provided they are consistent with the complaint."

The court also stressed the fact that Bagola stated that all the defendants knew the machinery was unsafe yet continued to force prisoners to operate it. This satisfied the requirement that prison officials have a subjective intent to violate the eighth amendment. In remanding the case to the lower court for further proceedings the appeals court instructed the district court to appoint counsel to represent him because it would serve the interests of justice. "Our holding concerning the relationship between *Bivens* suits and the prison worker's compensation system is one of first impression, and it may lead to further complex legal arguments necessitating the services of an attorney." See: *Bagola v. Kindt*, 39 F.3d 779 (7th Cir. 1994). ■

Prisoners Can't be Forced to Choose Between Law Library and Recreation

John Allen is a Hawaii state prisoner held in a Special Housing Unit (SHU) after allegedly assaulting a guard. His SHU confinement was indefinite. While in SHU he could use the law library and outdoor recreation area only during limited times and had to be escorted to each area by prison guards. Prison officials sometimes scheduled prisoners' opportunity to use the law library at times that coincided or overlapped with their opportunity for outdoor recreation. Allen claimed that he was frequently forced to go without outdoor recreation on days he had to use the prison

law library. Allen filed suit claiming that his right to be free from cruel and unusual punishment was violated when he was forced to go without outdoor recreation. The defendants moved for summary judgment on qualified immunity grounds, claiming prisoners had no well established right not to be forced to choose between outdoor recreation and law library use. The district court denied the motion at 816 F. Supp.1501 (D HI, 1993), see *PLN*, Vol 4, No. 8.

Prison officials appealed the ruling and the court of appeals for the ninth circuit affirmed. The sole issue on appeal was whether the district court correctly held that prison officials were not entitled to immunity for their actions.

The court gave an overview of prisoners' right of access to prison law libraries and notes that this right has been well established since *Bounds v. Smith*, 430 US 817, 97 S. Ct. 1491 (1977) was decided by the supreme court. "Similarly, several courts, including this one, had held that a deprivation of outdoor exercise to prisoners incarcerated for long periods and under highly restrictive conditions of confinement constituted cruel and unusual punishment. *Spain v. Procnier*, 600 F.2d 189 (9th Cir.1979)." [Editors Note: Numerous case citations are omitted from this blurb, for a further discussion on prisoners' right to exercise see *PLN*, Vol. 6, No. 1.] "Salgado is not entitled to qualified immunity simply because Allen cannot produce a case stating that an inmate is entitled to both his constitutional right to use the law library and his right to have outdoor exercise."

The court gave a good discussion of control unit prisoners' right to outdoor exercise on a regular basis. The court held that this right was so well established that reasonable prison officials would have known that denying prisoners their right to outdoor exercise was unconstitutional. Moreover, the defendants in this case have offered no justification for their failure to afford Allen both use of the prison law library and outdoor exercise.

The defendants based their appeal on an argument that Allen could choose whether to use the law library or have outdoor exercise. "However, the district court noted correctly that Allen's Fourteenth Amendment right to court access and his Eighth Amendment right to outdoor exercise are not 'either/or' rights. An inmate should not have to forego outdoor recreation to which he would other-

wise be entitled simply because he exercises his clearly established constitutional right of access to the courts."

"Although we recognize that exceptional circumstances sometimes may necessitate that an inmate make difficult choices between using the law library and pursuing other activities, an inmate cannot be forced to sacrifice one constitutionally protected right solely because another is respected." Thus, prison officials were not entitled to qualified immunity for their actions. The case was remanded back to the lower court for further proceedings. This ruling is an excellent one for those imprisoned in control units which often afford neither outdoor exercise nor law library access. See: *Allen v. City & County of Honolulu*, 39 F.3d 936 (9th Cir. 1994). ■

IL Visiting Rules Create Liberty Interest

Prisoners have no constitutional right to visit, thus any such right which can be enforced in court must be created by the state. In the March, 1994, issue of *PLN* we gave an ample discussion to visiting rights and privileges with numerous case citations. [Back issues are still available for \$1.] Many state prison visiting regulations do not create a liberty interest. Eddie Gavin filed suit claiming that Illinois prison officials deprived him of his civil rights when they refused to allow his relatives to visit him on several different occasions over a six month period. The court eventually dismissed the suit but not before giving a good analysis of Illinois visiting regulations and the case law pertaining to prison visiting.

Analyzing Illinois Revised Statute chapter 38, para. 1003-7-2(f) which states: "All of the institutions and facilities of the Department shall permit every committed person to receive visitors, except in case of abuse of the visiting privileges or when the chief administrative officer determines that such visiting would be harmful or dangerous to the security, safety or morale of the institution or facility. Clergy, religious chaplain and attorney visiting privileges shall be as broad as the security of the institution or facility will allow." The court concurred with several unpublished federal court rulings which have held that this statute creates a due process liberty interest which can be enforced in federal court via § 1983. Published cases have also held that the statute

"certainly creates a liberty interest in receiving visitors...." Likewise, several Illinois state courts have also interpreted the statute to create a liberty interest for Illinois prisoners to receive visits.

Illinois prisoners should be familiar with their visitation rights and the relevant law reported in this case. Likewise, others litigating suits concerning visits will find the case useful because it discusses numerous cases from other circuits analyzing visiting rules. The suit was dismissed because Gavin was unable to show that the defendants he had sued were the ones actually involved in depriving him of his visits. See: *Gavin v. McGinnis*, 866 F. Supp. 1107 (ND IL 1994). ■

MS Prison Rights Litigator Threatened

Julio Wicks is a pro se litigator who has been struggling for years to improve conditions at Mississippi's Parchman Penitentiary, which he characterizes as a "Plantation." As he puts it, "There are 8,000 Black slaves [of a total prison population of 10,000] on this plantation! 6,500 Black slaves are functionally illiterate. They work in the field approximately 12 hours a day with a white man on a horse, a shotgun cradled in his arms."

Julio has tried to expose the racism, oppression and corruption at Parchman. "The corruption here starts at the top. Marijuana, crack cocaine, etc. could not get in this prison in the volume it does without approval from the top. Once in a while they will think it's time to sacrifice an employee and they will. Right... they sacrifice a Black officer. Something to appease the public... There is something very sinister about this prison. I've come to that conclusion by observing activities here. I can't put my finger on it... everything associated with this joint stinks real bad."

Julio's perception is substantiated by the *Jackson Advocate* newspaper which stated that eleven prison officials have been charged with perpetrating and/or covering up the 1991 beating of prisoner Larry Floyd Jr. Five of the prison employees pled guilty. [See: *PLN* Vol.5 No. 10] According to the same *Advocate* article, the corruption extends to every level of the MDOC.

Julio has been severely punished for his refusal to cower under to the Plantation Massers. He has been indefinitely confined to a maximum security control unit 23 hours and 45 minutes a day. His over-

Litigator Threatened (cont.)

seers interfere with his mail and mess with his food. Last year a fellow prisoner informed him that a "contract" was out on him, and the contract was issued by a senior prison official. The best way to fight corruption and oppression is to shine the light on it. Oppression thrives in darkness and secrecy. As long as Mississippi prison officials know that the world at large is watching, Julio's safety may be secured.

For more information and regular updates on Julio's struggle, write to: Raze the Walls, PO Box 22774, Seattle WA 98122-0774. Letters of support can be written to Julio at: Julio Wicks #79367, Unit 32 B. Parchman, MS 38738. ■

Prisoners With Children

The Center for Children of Incarcerated Parents [CCIP] was created to produce documentation on and demonstrate model services for these special children and their families. CCIP has four components which include 17 individual projects.

The Information Component conducts research, provides technical assistance and produces publications. One project of this component, THE CLEARINGHOUSE at Pacific Oaks has a collection of over 3500 documents and audiovisual items, including items such as the Prison MATCH Parenting Series and publications for children. Over 300 of these items are available free to prisoners and their families.

The Education Component conducts seven different training projects for incarcerated parents, probationer parents, parents in recovery from substance dependency and care givers of prisoners' children. The Prison Parents' Education Project is a 32 week correspondence course offered nationally to any state or federal prisoner. Curriculum manuals for all CCIP training projects are sold through THE CLEARINGHOUSE.

The Family Reunification Component includes a mentoring program for pregnant, jailed women; an assessment and referral project for local families with children in the juvenile justice system and a child custody advocacy project. The CHICAS [Child Custody Advocacy Services] Project assists incarcerated parents throughout the US with child custody issues.

The Therapeutic Component provides school-based therapeutic interventions to children of prisoners and former prisoners. The Therapeutic Intervention Project [TIP] is the only program of its kind in the US. TIP provides weekly group counseling for the children, family support services for their parents or care givers, and teacher training.

The Center for Children of Incarcerated Parents is a child advocacy program of Pacific Oaks College & Children's Programs. All salaried CCIP staff members are former prisoners. CCIP has served over 5000 clients since it opened in 1990; all basic services are free to prisoners and their families. Prisoners and others may write for a brochure to:

The Center For Children of
Incarcerated Parents
714 West California Boulevard
Pasadena, California 91105

BOP Set to Stun Prisoners

A Bureau of Prisons (BOP) reader sent us a photocopied BOP Policy Statement (P.S. 5558.10) dated September 30, 1994. The policy statement authorizes the BOP to force "maximum custody inmates" to wear what it describes as a "Remote Electronically Activated Technology (REACT) Stun Belt" as a custody control tool to be used within the BOP. Prisoners will be "asked" to sign the "Inmate Notification Of Custody Control Belt Use" form which is quoted in full below:

"You are hereby advised that you are being required to wear an electronic restraint belt. This belt discharges 50,000 volts of electricity. By means of a remote transmitter, an attending officer has the ability to activate the stun package attached to the belt, thereby causing the following results to take place:

1. Immobilization causing you to fall to the ground.
2. Possibility of self-defecation.
3. Possibility of self-urination.

FAILURE TO COMPLY WITH THE OFFICER DIRECTIONS COULD LEAD TO ANY OF THE ABOVE.

The belt could be activated under the following actions on your behalf and notification is hereby made:

- A. Any tampering with the belt.
- B. Failure to comply with staff's verbal order to halt movement of your person.

- C. Any attempt to escape custody.
- D. Any attempt to inflict serious bodily harm on another person.
- E. Any loss of visual contact by the officer in charge.

I UNDERSTAND THE ABOVE INFORMATION AND ACKNOWLEDGE BEING ADVISED OF SAME.

There is a place on the form for "inmates" to sign. It is notable that this document fails to mention any other possible side effects from being shot with a jolt of 50,000 volts of electricity—such as heart attacks, permanent twitching, memory loss, vomiting, etc.

Readers should note the June 1994 *PLN* article, "Stun Gun Use Violates Constitution" which cites a case wherein use of a stun gun to force a reluctant prisoner to comply with an order to clean his cell was ruled to be a violation of the eighth amendment's ban on cruel and unusual punishment. See: *Hickey v. Reeder*, 12 F.3d 754 (8th Cir.1993).

We at *PLN* could eloquently editorialize this piece of information, perhaps mention how gleefully Hitler would have approved of such a device, etc. etc. But, frankly, the above "Inmate Notification" form pretty much says it all. We can't think of anything to say that would be more preposterous or have greater impact than the BOP statement itself. So there you go. What's next? ■

WY Trailer Visits Taken

Wyoming penitentiary warden, Duane Shillinger, issued a memorandum to "All Inmates" notifying them that the "Family Visiting Center" would be closed effective April 1, 1995. The warden said he regrets making this difficult decision. The reasons stated in the memo for terminating the trailer visit program are "times and conditions have changed since the program was first implemented. With the increasing population, greater security responsibilities, and limited budget, utilizing employees and other resources to maintain the family visiting program can no longer be justified. Penitentiary employees are now hard pressed just to locate living space for the increasing population."

A Wyoming prisoner writes that "the real reason is because they want to convert the three trailers into trustee living units." ■

Prisoners as NAFTA Export?

Worried about the cost of California's new Three Strikes And You're In Law—recently made a constitutional amendment by the success of Prop 184? Some say it will bankrupt California as we convert the State into a 21st Century Gulag. The voters pamphlet conservatively predicted that \$20 billion will be spent for new prisons in the next 30 years, and operating costs will rise by \$3-\$6 billion a year over that time, over the already skyrocketing incarceration rate increases. It's safe to say that those estimates are way too low. We haven't even scratched the surface of the Tough-On-Crime mentality. There's an endless supply of "criminals" soon to include 10 year olds who refuse to wear bike helmets and high schoolers who protest school policies. Where will the State get all that prison money? Education? Not education! What will we do? What will we do?

Not to worry, Bippy. A newly elected Georgia congressman who is a retired cop and ex-Newt Gingrich top aide is already at work on the Real American Solution: a NAFTA-inspired bill that would sub-contract long term incarceration to Mexico at bargain rates. He says he's already spoken to the Mexican government about it and negotiations are underway. This would be a Win-Win-Win-Win-Win-Win-Win scenario, wouldn't it? Prison guards who thought their over-paid union jobs were secure should think again. Like everyone else: *You can be replaced.* And Mexico wouldn't coddle those damn dope peddlers. With a few pastel interior redecorations, cottage industry entrepreneurs could convert newly **vacant** places like Pelican Bay into lunacy B&Bs for fun & profit. See? Winners everywhere! Let Mexico be the prison, then we could use NAFTA to subcontract low skill work to our own prisoners since Mexico's already equivalent to prison labor anyway. And trash, don't forget The Trash! Sub that out too—we've wrecked Mexico with industrial pollution already, why not finish the job? Surely they wouldn't mind. Think of the recycling opportunities!

Reprinted from *Anderson Valley Advertiser*

WA Civil Commitment Sham

In 1989 Washington State passed a controversial "Sex Predator Law" (RCW 71.09) to allow for the "civil commitment" (indefinite incarceration) of "dangerous sexual predators." The law allows the state to file commitment papers on prisoners who have completed their maximum terms of incarceration and are due to be released from prison. The prisoner is afforded a jury trial in civil court where the state must show that he suffers from a "mental abnormality or personality disorder" that predisposes him to commit sex crimes and that a high likelihood exists that if released from prison he would commit predatory sexual offenses in the future.

Opponents of the law claim that it violates prohibition against double jeopardy, ex post facto, self-incrimination, and vagueness of content. Opponents also claim that the statute violates equal protection and due process and that the law sets up an Orwellian "dangerousness courts" masquerading as mental health treatment. David Summers, writing on behalf of the Washington State Psychiatric Association in an amicus brief, states that the "Sex Predator Law" is based on an invented pseudo-science that encourages the ad hoc invention of psychiatric disorders to achieve a social end.

Although those who are found to be sexual predators are confined to a "treatment center" until they can show that they are no longer dangerous, the law's true purpose is indefinite imprisonment of those who fall under its scope. Challenges to the civil commitment law itself have withstood state supreme court scrutiny. (See: *In re Young*, 122 Wn2d 1 (1993) (En Banc), reported in *PLN* Volume 4, No. 12) Since that ruling similar laws have been passed - based on Washington's "Sex Predator Law" - in Wisconsin, Kansas, New Jersey and California. The Washington law is currently being litigated in federal district court.

Recently the application of civil commitment ventured into new territory. In March of this year a prisoner, Mitch Gaff, was civilly committed even though he had successfully completed the state run Sex Offender Treatment Program (SOTP) before completing his ten year sentence. Past and present directors of the SOTP testified at Gaff's civil commitment trial that only about a third of prisoners who enter the SOTP complete the

program, about a third drop out and another third are kicked out. Mitch spent 26 months in the SOTP and successfully completed the program.

The prosecution argued that the SOTP does not provide adequate treatment and presented expert witnesses whose testimony was designed to discredit the state run sex offender program. The prosecution also presented to the jury extensive information about Gaff's history of sexual assaults and deviant behavior. The overwhelming bulk of this damaging testimony about his past behavior was gleaned from information that Gaff self-disclosed while in treatment. While such open self-disclosure is a critically important part of the treatment process, it has also been shown in this instance to be a critically important part of the prosecution's case.

The prosecution also relied heavily on the expert testimony of Dr. Robert Wheeler who touted recent advances in the "science" of predicting future dangerousness of sex offenders. Most of Wheeler's expert testimony was based on his interpretation of the research of Dr. Vernon Quinicy of Canada. Dr. Quinicy has developed a statistical scoring method for predicting future dangerousness of sex offenders. The offender's history is analyzed and compared to a series of actuarial tables based on data relating to other offenders who have reoffended.

Gaff's attorney, Caroline Mann, argued that the statistical data should not be presented to the jury because of its purely speculative nature. The judge allowed the testimony about statistical actuarial tables, though, as a means of letting the jury know what Dr. Wheeler's expert opinion was based upon. In that indirect way the actuarial tables were allowed to sway the opinion of the jury, lending scientific authority to the state witnesses' claims that Gaff was likely to reoffend.

Of the dozens of variables used to calculate the actuarial risk of reoffense, all but one are based on the offender's past history, i.e. family history, performance and behavior in school, record of arrests, etc. Only one of the variables considered can be changed over time, results of a plethysmograph test that measure physical arousal to various sexual stimuli. When Gaff's attorney pointed out that his plethysmograph scores indicate a low arousal to sexually deviant stimuli, Dr. Wheeler countered that most offenders have

the ability to purposely suppress their arousal and thereby "beat" the test. It would appear, then, that there is absolutely nothing Gaff can ever do - not with any amount of treatment - that would lower his "scientifically" calculated risk to reoffend.

Gaff was housed in the state's Special Commitment Center during the pretrial proceedings and the trial. He reports that staff at the center told him they have no idea of what treatment they could offer that he had not already successfully completed during his 26 months in the SOTP.

In theory the civil commitment law is designed to allow for the confinement of persons who suffer from a "mental abnormality" until they have received sufficient treatment to no longer present a threat to the community. In practical application the law is nothing more than indefinite incarceration of prisoners who have already completed their full sentences. Period. This case illustrates that point rather clearly. ■

TDCJ Grows & Grows

The Texas Department of Criminal Justice (TDCJ) had a 1994 budget of \$1.84 million dollars. According to the Texas Comptroller that is slated to grow to \$3 billion by the year 2000. Texas currently has an incarceration rate of 553 per 100,000 (the highest in the country) and this is projected to grow to 1,428 incarcerated Texans per 100,000 which translated to one out of every 70 Texans. That figure is expected to include one out of nine black Texan men. One of every 18 Texan men is currently locked up.

While blacks make up 12 percent of Texas' general population they composed 48% of its prison population in 1992. Whites make up 61% of the state population and 29% of the prison population, for Hispanics the figures are 23% in prison and 26% outside.

State Representative Wilhelmina Delco of Austin, and vice chair of the Texas House Corrections Committee, says: "Prison and criminal justice are the only growth industries in Texas." By 1996 the state will have 128,000 prison beds which is double the number it had in 1992. Construction costs alone, which are not reflected in the TDCJ's operating budget above, will total more than \$3 billion. ■

Tommy's Jobs Program

by Adrian Lomax

Gov. Tommy Thompson recently unveiled his startling plan to put inmates to work in Wisconsin prisons. Thompson wants to allow private businesses to construct production facilities inside state prisons and employ inmates as laborers.

The Governor assures us that his plan will accomplish several laudable goals. Instead of sitting idle in prison, inmates can learn skills that will help them land jobs on the outside after their release. Merely becoming accustomed to the discipline of getting up and going to work each morning will be a step in the right direction for many prisoners, Thompson reasons. Furthermore, the Department of Corrections would be able to seize the wages paid to inmates and apply those funds to offset the cost of operating the prisons. The Governor estimates that his program could raise \$50 million per year from inmate labor.

Thompson's plan disturbingly resembles the prison-labor practices in China and other countries whose human-rights records Wisconsin should not seek to emulate, and the plan has been roundly criticized on that point. But the purely racial implications of the Governor's plan, which have been over-looked by the mainstream media, are striking as well.

The unemployment rate for African Americans in Wisconsin, as in the rest of the nation, is much higher than the overall unemployment rate. This is true for a number of reasons, but among the prominent is that many white employers suffer under the burden of racist stereotypes and hesitate to hire Black workers. African American job applicants are often denied even low-wage, menial jobs unless those jobs attract no white applicants. And Blacks receive differential treatment in the distribution of promotions and raises. Young Blacks, especially those who don't adopt middle-class (white) mannerisms and speech patterns, suffer the most extensive discrimination, often being shut out of the job market completely.

Not surprisingly, some of the African Americans who are denied opportunity in the labor market seek their fortunes elsewhere. Drug trafficking, prostitution and other illegal enterprises ensnare many Blacks who have become convinced that

they stand no chance of success in the white-dominated corporate world. Because imprisonment is a major occupational hazard in illicit enterprises, African Americans make up a disproportionately large share of the prisoners in our prisons. Gov. Thompson now proposes a solution to all those problems. After we get people locked away in prison, he says "then we'll give 'em jobs!"

Of course, the Governor's proposal couldn't possibly be more wrong headed. If the people who are now in prison had been able to get jobs on the outside, many of them wouldn't have ended up in prison in the first place. So why wait until people are in prison before giving them jobs? A jobs program to provide meaningful employment for young African Americans outside of prison would reduce crime and help young Blacks pry open the door to success, thus benefiting society as a whole. But Thompson, a Republican who bills himself a fiscal conservative, has never proposed anything resembling that.

I can think of a couple reasons why the Governor might find it appropriate to propose a jobs program only for those among the state's poor who happen to be in prison. For one thing, Wisconsin law specifically prohibits prisoners from forming labor unions. It seems Thompson is stealing a page from the government of Mexico, which has sought to attract American corporations by promising to prevent workers from organizing unions. Secondly, Thompson proposes to confiscate the wages that companies pay prisoners and use the money to pay the cost of running the prison system. Apparently, Thompson likes the idea of providing jobs for African Americans only if they don't get to keep their wages.

Blacks will be hurt by Thompson's new program in yet another way. A company that builds a factory inside a prison will obviously not be building that same factory on the outside. The jobs that Thompson's plan gives to prisoners would otherwise go to workers on the streets. Since African Americans tend to be the last hired and first fired, any outside jobs sacrificed to create jobs inside the prisons will likely result in Blacks, rather than whites, being laid off. The prison-labor program would therefore feed on itself, making jobs even harder to

come by for African Americans on the outside and stacking ever higher the obstacles to success that result in so many of our young people ending up behind bars.

A jobs program that would lower the unemployment rate for young Blacks in this state is sorely needed. Leave it to Tommy Thompson to defeat every purpose of such a plan by adding the crackpot caveat that someone seeking employment must commit a crime in order to benefit from the jobs program. ■

Alert: Danger in Using Bleach to Clean Needles

by David Gilbert

The standard method to clean injection drug equipment that has been widely promoted turns out NOT to work. The three squirts in and out with household bleach (10% solution) followed by three squirts in and out with water looked promising in the laboratory. But now results have come back from actual use in the field: those injection drug users (IDUs) saying they used this method all the time had the same high HIV seroconversion rates as those who never used it. The problem is that HIV is a lot harder to kill in human blood, especially with the problem of clotting inside works, than in laboratory cultures. The CDC summarized the research in their report, issued along with the CSAT and NIDA, of April 19, 1993. Current research now suggests using full strength bleach (100% solution) and leaving the bleach inside the needle and syringe for a full 30 seconds each time (to be followed with the cleaning out with water). Shaking and tapping the syringe when it is filled with pre-bleach wash water, with the bleach, and with the rinse water are also recommended to improve effectiveness. This method does not guarantee sterilization but can play a role in "reducing" the risk of transmission. (For a good, 1-page summary of the research, see *Medical Alert*, 10/11, 1993.)

Over the past several years, health departments and AIDS service organizations disseminated hundreds of thousand of leaflets teaching the old method that has since proven to be ineffective. It is shocking that there has been so little effort to now publicize these changes, which are of life-and-death importance.

Why have the authorities been so lackadaisical about alerting us—are they embarrassed about calling attention to their mistakes? Or are they shrinking from the logical conclusion on the need to push for needle exchanges? Whatever the reasons may be, this appears to be another example of the callous disregard for life that has prevailed throughout the AIDS epidemic.

Most health agencies are now putting out the updated method in their post-1993 literature. But without the needed highlighting that this is a critical change, most IDUs, believing they already know the proper bleach method, won't even look at the new literature. Getting the right concentration of bleach requires a conscious effort, and it will take a lot of work for IDUs to learn to wait the full 30 seconds each time. Because this new method is so complicated and because it still provides no guarantee, much more emphasis and effort should be devoted to not sharing needles/works at all.

In short, it is urgently important to alert all IDUs that: 1. 10% bleach solution does NOT work; you must use full strength, 100% bleach. 2. It is important to leave the bleach in for a full 30 seconds each time; either time it with a watch or count from 1 to 100. 3. Shaking and tapping the syringe at all phases of cleaning can help. 4. Since it is so difficult to sterilize them for sure, your best bet is to never share needles/works. ■

Venezuelan Prison Crisis Continues

Past issues of *PLN* have reported the massive crisis overwhelming the Venezuelan prison system. This has ranged from riots leaving hundreds of dead, mass escapes, protests and more. Human rights groups claim that Venezuela has the worst prisons in the hemisphere. On December 19, 1994, 41 prisoners at the Tocuyito prison in Carabobo stabbed and slashed themselves to protest conditions in the segregation cells they were placed in after a recent escape attempt. [See *PLN*, Vol. 5, No. 12].

Prison guards broke up the protest and all the prisoners were treated in a hospital. Prison officials stated that many of the prisoners were seriously injured with stomach wounds and cuts to their necks and wrists. Reporters were able to speak to the prisoners who were in cells covered

with blood. The prisoners stated they were being subjected to inhumane living conditions, confined to cells without water or light. Eight prisoners were jammed into cells measuring two square meters. Luis Lugo, police inspector of the Carabobo police stated "It's tough in there, all concrete and very little space. They are not allowed out for exercise."

On December 28, 1994, Justice Minister Ruben Creixems announced that the National Guard would be sent to seven prisons throughout Venezuela from December 29, 1994, until at least January 31, 1995. "The object of the militarization is to protect the life of the inmates and to return order to the penal system." The announcement came several hours after two prisoners died fighting other prisoners in the Catia prison Caracas. On December 30, the National Guard took over Catia prison and confiscated 600 knives and an undetermined amount of drugs.

An unannounced military search for weapons and drugs at the San Antonio prison on Margarita Island, December 22 led to rioting by prisoners. Two cell-blocks were set on fire injuring 15 prisoners and one National Guardsman.

On January 2, 1995, prisoners at the Santa Ana penitentiary in Tachira rang in the new year by rioting and killing between 4 and 15 prisoners, the final death toll was not confirmed. According to prisoners quoted by local radio stations the incident began when newly arrived prisoners began robbing other prisoners at the prison. To halt the thefts a group of veteran prisoners attacked the robbers with guns and knives. Santa Ana was built to hold 1,400 prisoners but now holds 1,900. The prison was surrounded by army troops who did not enter the prison until after the fighting was over and prison officials had made a deal with the prisoners to transfer the new prisoners to other prisons.

Provea, a Venezuelan human rights groups reported that from January 1 through September 1, 1994, at least 498 prisoners were killed and 1,127 wounded in Venezuelan prisons. "The levels of prison violence continue rising. Prison riots take place virtually every day." The death toll is due to fighting between the prison gangs and murders by government security forces. The Venezuelan prison system holds over 33,000 prisoners in 33 prisons, four times its rated capacity. Prisoners continue to be tortured and ill treated by police and prison forces. ■

Special Prison for Military Criminals in Chile

The Chilean government is faced with the prospect of some high ranking military and police officials going to prison for committing crimes against humanity during almost 20 years of U.S. backed fascist military rule. In response, it has announced plans to build a special prison to house military and police prisoners. Historically, when Latin American military men have been convicted of heinous crimes against their citizens they have spent a few years in house arrest or held in luxurious conditions on military bases, etc. before receiving pardons.

Chilean leftists believe that the special prison idea is part of a deal reached by the Chilean government with the military, which still rules the country behind the scenes, to allow some of its members to be tried by the courts in the first place. The sentences handed down are very light, i.e. the former head of the secret police and an army general were sentenced to 6 and 7 years for ordering the murder by car bomb of Orlando Letelier, a former Chilean defense minister, and his America assistant in Washington D.C. By contrast, communist prisoners are held in harsh repressive, control units modeled on Marion in the U.S. and Stamheim in Germany to serve lengthy sentences. [See *PLN*, Vol. 5, No. 5]

There is a great deal of public outrage over the special prison idea among Chileans. Public Works Minister Ricardo Lagos refused to sign a decree authorizing the prison's construction and resigned in protest. The government will now ask that country's congress to vote on the prison whereby the responsibility for building new prisons will go from the Public Works Ministry to the prison service. Some legislators state the law is unlikely to be passed due to its unpopularity. It remains to be seen what will happen if military criminals refuse to go to prison unless it is one built especially for them. ■



The Political Base of the Death Penalty

by Monica Zucker

The experiences of murder and punishment change enormously in different places and different times. All of us know that in our time the United States ranks very high in number of murders and prisoners, in length of incarceration, and in death sentences.

We may be hardened to comparisons with apartheid South Africa, and we may not even believe the similarities that are pointed out between our center of Western democracy and the tyrannies of lands we consider much less "civilized." Yet the facts are evident and they are upsetting. Why do we have so much violent crime? Why do we believe that violent punishment is the cure? Could other solutions be accepted in our country? And, are these issues religious, political, or psychological?

While the questions can be profitably viewed from all angles, I believe the issue we must face more frankly is not individual guilt or individual compassion, but the collective responsibility of our society to provide the possibility of a decent life. There will always be deviations from society's norms; the question must be: Is the norm available to all at us? Do we insist that our government provide for the general welfare and the chance of life, liberty, and the pursuit of happiness for which our founders believed governments were instituted?

If American society cannot shape itself in accord with that goal, if the objectives of our government and our economy and our social patterns fail so far from that responsibility that a significant number of people cannot function within it, there is sure to be a lot of crime. The "social contract" breaks down. Alienation takes the place at community. Where people have no sense of control over their destinies, they cannot be constructive participants in society.

Looking for "bad apples" in the barrel won't remove the problems. We cannot ensure our safety by doubling the number of prisons or sentences of death. And in an unjust society, a coalition to abolish the death penalty cannot rely on sympathy for those on death row to abolish the death penalty.

We who oppose the death penalty realize that hanging, shooting, and poison-

ing people is not a reasonable response to murder. We understand that the desire for revenge and the belief that the death penalty can deter murder are largely reactions to fear and stress. We know that justice is different for the rich and the poor, the white and the black. We recognize the Herculean task of lawyers in death row cases that have been botched from the beginning, and we deplore the failure to provide sufficient legal protection for indigent accused. We're aware that prosecutors often succumb to emotional and popular calls for the death penalty. We understand these political facts about the death penalty.

Yet there are more basic truths that underlie the political base of the death penalty. Our society creates an ideal setting for murder, decides what segments of our population are expendable and concludes that death is a satisfactory solution to murder because it doesn't affect "us"—only "them."

These issues need a lot of thought. And we must consider more than murder and the death penalty, for although murder is the crime that most clearly demonstrates alienation from society, rejection of community is the basis of many crimes: assault and rape, embezzlement and government sleaze, and destruction and theft of property. (I don't consider the retreat into alcohol and drugs a crime, but it is another, more passive form of alienation.) Yes, we need to impose sanctions for crime, but we can't control it merely by harsh punishment.

In the 80s we multiplied our prisons and began to execute more people. At the same time we halved our expenditures for social needs and intensified a caste system to exclude African Americans, Latinos, and other people of color. Now the rich glory in the 2,000 point gain in the stock market, while millions of decent paying jobs are lost to part-time employment without security or benefits and vast numbers of women are left alone to raise their children in poverty. We maintain large numbers of unemployable young males. We don't educate them. We have a "war on drugs" which, from all appearances, is another racist attack on urban poor.

Dr. Jerome Stolnick, Professor of Law at the University of California at Berkeley, points out that family and societal structures depend on jobs. "Employment," he says, "is a term of social control." He then repeats the prophetic lines he first wrote in the official report on the urban riots of 1968:

"A democratic society cannot depend upon force as its recurrent answer to long-standing and legitimate grievances. This nation cannot have it both ways: Either it will carry through a firm commitment to massive and widespread social reform, or it will develop into a society of garrison cities where order is reinforced without due process of law and without the consent of the governed."

The death penalty would thrive in those garrison cities. A just penalty for murder must be sought in a more just society. We must continue to point out the injustice of the death penalty, and also the broader injustice that spawns alienation and violence in both the murderer and the executioner. ■

S&L Looters Do Less Time than Petty Thieves

by Paul Wright

Fraud in the Savings and Loan Industry: *White Collar Crime and Government Response* was written by University of California, Irvine, criminology professor Henry Pontell and associate professor Kitty Calavita. The three year study was commissioned by the Department of Justice. The report found that not only do most Savings and Loan (S&L) thieves go unpunished but the ones who are punished typically receive shorter prison terms than car thieves and common burglars.

The Savings and Loan industry collapsed in the mid 80's after the federal government deregulated the industry. This resulted in high risk, speculative investments that led to massive losses. The U.S. taxpayers are going to pick up the tab for the S&L collapse and it will cost at least \$500 billion to pay off over the next 20 years. Pontell states that at least 25 percent of their industry losses are directly attributed to fraud by their owners and managers. This included high salaries, luxurious living amid other squandering

of thrift resources in addition to outright theft.

The study found that of 580 people convicted of S&L fraud only 78 percent were sent to prison. Of that 78 percent only 4 % received sentences of 10 years or more and another 13% received sentences of more than 5 years. In 1988 the average sentence for major thrift crimes was 36.4 months. In contrast, the average sentence imposed on burglars was 55.6 months and a little less than 38 months for car thieves.

The amounts stolen by the S&L owners and operators is staggering. Thomas Spiegel, of Columbia Savings is on trial in Los Angeles for stealing millions, including his \$9 million annual salary. Centrust Bank Chairman, David Paul was convicted in Miami of stealing more than \$380 million.

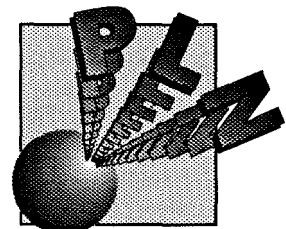
The study apparently does not include cases where S&L operators were sentenced to more than 10 years but actually released far earlier. A typical case is that of Don Dixon and Edwin McBirney, their thrifts lost more than \$3 billion dollars, to be paid by taxpayers. Both were sentenced to 15 years in prison. In exchange for cooperating with prosecutors their sentences were shortened to five years or less. McBirney is due to be released in early 1995, after having served about 20 months, Dixon was released on November 7, 1994, after serving less than 4 years.

The study confirms what many already know, namely that the bigger the crook the less time they will do, assuming they even see the inside of a courtroom. Michael Milken made billions of dollars through fraud (in one year he made over \$550 million) and was sentenced to 10 years in prison. He later got his sentence reduced and served only 20 months and he got to keep most of his money so that even after paying hundreds of millions of dollars in fines he remains one of the richest men in America. While he was convicted of fraud his other crimes were not charged because in a capitalist economy they are not even "illegal." The "legal" ways Milken made money was to target companies whose worker pension funds were adequately financed to provide for their workers retirement, take them over, loot their pension funds, lay off workers, sell off its valuable assets then after this "downsizing" sell the company. This took place on a massive scale and resulted in tens of thousands of workers being laid off, jobs were moved to

third world sweat shops and workers were deprived of the pensions they thought they had spent their lives earning. In the wake of this human devastation, which is perfectly "legal," Milken is still rich, out of prison and making money teaching business courses at UCLA. Milken's buddy Ivan Boesky did the same, after doing less than 3 years in a federal prison camp and paying hundreds of millions of dollars in fines he too remains one of the richest men in America, uncharged for his real crimes.

Former televangelist Jim Bakker was convicted of defrauding tens of thousands of citizens and investors for more than \$100 million and originally sentenced to 45 years in prison. He was released after less than five. Leona Helmsley, a billionaire, was sentenced to four years in prison for tax evasion but got a sentence reduction so she could be with her ailing husband. She served less than 18 months.

The average total amount of money and property stolen in street crimes, bank robberies, etc. in the U.S. is a fraction of that stolen by people like Milken, Dixon, et al. Yet the poor who steal little are punished far more harshly than the rich who steal a lot. Illustrating that the "criminal justice" system exists to keep the poor in their place rather than to serve any abstract notions of justice. German playwright Bertolt Brecht once asked which is the greater crime, to rob a bank or to own one? The DOJ study concludes that robbing and looting your own bank is a lot more profitable and a lot less likely to be prosecuted than robbing someone else's. The average take in an armed bank robbery is only \$1,500, the average sentence for a first time offender is 5-7 years. Not stated but readily apparent is that the criminal laws of this country are aimed at protecting the property and money of rich people from theft by the poor, not the other way around. How much time do you think you'd have gotten for stealing \$3 billion? Men in Washington state are being sentenced to life in prison, without parole, for stealing \$151. In California stealing 50 cents is getting a 25 year sentence without parole. ■



Notes From The Editor

by Dan Pens

Welcome to the special 28-page 5th anniversary issue of *PLN*. With this issue we begin our sixth year of continuous publishing. Our first issue was ten pages, typewritten, photocopied and mailed 1st class to 75 readers. A lot has happened over five years. As we have grown, the workload has increased enormously. It has turned into a full-time job for both Paul and me. In addition, we rely on the efforts of an increasing number of volunteers to keep us going.

A special thanks go to Dan and Sandy who have helped with the desktop publishing, mailings and a hundred other details. Thanks also to Rollin, our publisher, who manages the Florida PO Box and handles the *PLN* bank account. Allan does the OCR scanning, is a valuable computer consultant, and has contributed a lot of time and money to do photocopying for us. Another Dan is our gateway to the Internet. He surfs the net and downloads news items of interest for Paul and I to scan through. Dan has also helped us keep up on the activities of the legislature and is an invaluable computer consultant. Ellen contributed much of the software we use and has helped with fund raising efforts. George has helped straighten out problems with the post office. In the early days we had help from people like Janie, Jim, Michael, Scott, Carol, Ann, Kris and others when we really needed it. There are simply too many people who help us in countless ways to thank them all in this column. Paul and I put our names on the editorial page, but we're only a small part of the network of people whose efforts sustain and support our work. So to the rest of you, you know who you are, a heartfelt thanks for all you contribute to *PLN*.

This past year saw a lot of growing pains. We have been chronically late with our deliveries from March of 1994 through March of 1995. We have finally gotten back on track, and since the April issue we have mailed on time. Something that has always demanded a lot of our time is the problem of prison mail rooms "losing" issues or marking them "refused" and sending them back. In "the good old days" we would respond by hopping on our horses and riding into battle with the prisoncrats. We'd send a letter to the aggrieved reader informing him/her that "it looks like we are having

a problem with officials in the mail room there." Yesterday I sent out the first batch of letters with one important word change - the letters inform our reader that "it looks like *you* are having a problem with officials in the mail room there." It's just one little word, but it reflects a big change in the way we operate. Paul and I no longer have time to hop on our horses and ride out to every little skirmish. There are too many of them for us to handle alone. We need our imprisoned readers to fight the local fights themselves. If your *PLN* isn't getting to you, write us a letter and let us know what's happening. But more important, write a letter of complaint or grievance to the mail room or warden and send us a copy. If you're unable to straighten it out on your end, or if it's a problem that effects readers in an entire prison or state, Paul and I will hop on our horses.

In five years we have raised our subscription rates only once. When we expanded from ten to sixteen pages we increased our individual subscription rate from \$10 to \$12 a year, and our institutional rate from \$25 to \$35 per year. Postage rates increased at the beginning of this year, and yesterday our printer told us that printing costs are going up by 20% due to a paper shortage.

Prior to 1994 our records are scanty, but since January of 1994 here's the scoop. Our readers have donated an average of \$1,054 per month. About 60% of our readers are prisoners, and they contribute about 40% of the donations. The average amount donated (by all readers) per issue is \$1.02. During the same time span our average operating expenses were 99¢ per issue. These figures do not reflect the money taken in from grants and large donations, and they also do not reflect capital expenditures (such as computers and software) and promotional expenses (approx. 6,000 sample copies we have mailed out). So as it is, we are operating on the ragged edge. The latest rise in printing costs (our single biggest operating expense) will push us over that edge. As such, we are planning to raise our institutional subscription rate from \$35 to \$50 per year. The individual rate will remain at \$12. You're always welcome to donate more, though.

We're in the midst of a subscription drive, and hope to reach 2,000 subscribers

within the next few months. When we reach that plateau we'll expand our format to 24 pages and raise our institutional subscription rate to \$50 per year.

One final note. On Friday, March 17th Paul was placed in ad-seg for allegedly being involved in a work strike. Apparently the DOC heard rumors of an impending work stoppage and gaffed Paul up as "one of the usual suspects." He was released back into population five days later, partly because the charges proved to be false. But part of the reason the "investigation" was concluded and Paul released within a mere five days was due to the immense number of phone calls, faxes and letters prison officials received from *PLN* supporters and prison rights activists who responded to this injustice. Paul and I thank those who intervened on his behalf. That's all. Enjoy this issue and pass it on to a friend, and please encourage your friends, colleagues and family members to subscribe.

Tip of the month: read anything written by Noam Chomsky. ■

FL Ends Early Releases

On December 9, 1994, Florida Governor Lawton Chiles announced that the state was ending its gain time program. The program was instituted in 1987 by then Governor Bob Martinez (R) to comply with a federal court order designed to limit Florida's extreme prison overcrowding. Under the program prisoners received up to a two thirds time reduction in their sentences.

Florida state prisoners will still receive time off for good behavior, up to 25 days a month for less serious crimes and 20 days a month for serious crimes. As of September, 1994, Florida prisoners would serve 45 percent of the sentence imposed. This is up from 33% served in 1990.

The change is due mainly to Florida's massive prison building program which will add 4,000 prison beds by December 31, 1994, and another 8,000 beds by July 1, 1995. The enactment of recent sentencing guidelines [See *PLN*, Vol. 5, No. 5] which resulted in reducing the numbers of property and drug offenders sent to prison. In 1990, 4,000 new prisoners a month were entering the state prison system, by December 1994, that had been reduced to 2,000 per month. ■

Harsher Prison Measures Opposed: "Family Values" Stop Here

By Dan Tennenbaum and Davis Oldham

Seattle WA – On March 20th, about 30 people braved a heavy downpour and strong winds to demonstrate against state Republican efforts to curtail prisoner rights. Friends and family members of prisoners, as well as prison activists, came to the King County Jail to protest proposed legislation that would severely restrict the Extended Family Visit [EFV] program, access to television and weightlifting equipment, and other "privileges" accorded prisoners.

The main target was state House Bill 2010, known as "The Omnibus Prisoner Responsibility Act" an amalgamation of several smaller bills.

The first thing HB 2010 calls for is full employment for all prisoners and a mandatory program to bring all prisoners to the same minimum educational level. Currently, however, there isn't enough work to keep all prisoners employed full-time. The work available often pays much less than minimum wage—as low as 25 cents an hour. As for education, some is available, but what is a lifer going to do when he's already got three A.A. degrees? Under HB 2010, prisoners who can't scrape together 40 hours of work or school will be disqualified from EFVs and from owning televisions. Cable TV will not be installed in any new facilities. Weightlifting will be restricted to prisoners who can join approved teams; these teams are small and won't exist at every prison. Basic rights, from name changes to health care, will be curtailed as well.

What concerns protesters and prisoners the most is the proposed near-total elimination of EFV programs. Under these programs, eligible prisoners get to spend two days with family members in a trailer on prison grounds. That EFVs are being targeted by the so-called "Family Values" crowd is just another of the many ironies in Newt-onian America.

Lawmakers' claims to the contrary notwithstanding, demonstrators argue—and prison officials confirm—that none of these programs are taxpayer funded. The money comes from the inmate-betterment fund, an account supplied by prisoner earnings, receipts from prison-telephone services, vending ma-

chine and the like, or from prisoners' own accounts.

One demonstrator whose husband is a prisoner argued that the proposed limits on EFV violates the rights of people not accused of any crime—the families of prisoners. Spouses and children would not be allowed any contact with partners and parents outside the restrictive atmosphere of the visiting room. As one prisoner's wife, herself a former prisoner, put it, "These visits let you cook meals, spend the night, have some quality time with your family. They're not just about conjugal activities [i.e., sex]." The visits also allow siblings, parents, and grand parents to spend time with prisoners. A woman hoping to marry a prisoner in June remarked that if Republican legislators have their way, the wedding will not take place. "I haven't done anything wrong, yet I won't be able to get married. Why?"

Protesters claim the programs keep families together and motivate prisoners to retain their social skills, without which they might be at a disadvantage upon release. "It's good for their health, physically and emotionally," one said.

Many wardens and prison guards agree that "privileges" like TV, weights, and EFVs keep the lid on prisons and help prevent violence. The Department of Corrections opposed an earlier version of HB 2010 for just this reason.

Prisoners at the Correctional Center for Women in Purdy staged a one-day strike Monday, March 20th to protest HB 2010, and a prisoner at the State Reformatory in Monroe was thrown in the hole for allegedly organizing a strike there. These incidents were peaceful, but desperate people can resort to violence. If you take away programs that help prisoners cope with prison life and retain social skills, one woman commented, "you might as well just lock them up for life."

Why should criminals have these opportunities, whether or not they're paid for by the state? The woman who hopes to get married next summer gave a telling response. "I used to think like that myself," she said. "They're criminals, they don't deserve anything—just put them on the chain gang." She paused, and then added, "It keeps them part of the human race." ■

Source: *The Stranger*, 4/5/95

WA Prisoners Help Elect Republican

By Paul Wright

From 1981 to 1993 Jack Metcalf held office in the Washington state Senate. In 1994 he was elected on the Republican ticket to represent Washington's second congressional district. This is a story about prison slave labor, opportunism and hypocrisy by politicians and prisoners and media collusion. Metcalf is extreme right wing even by current Republican standards. In 1987 Metcalf launched Referendum 41 challenging the constitutionality of the Federal Reserve System. In its coverage of the referendum the *Wall Street Journal* commented that Metcalf was a "frequent speaker at right wing rallies and conferences across the country, [who] keeps company with gold bugs, tax protesters, and conspiracy theorists." Right wingers have long attacked the Federal Reserve as a tool of the "Jewish Banking Conspiracy."

In 1988 Metcalf was criticized in a hate group report issued by the Center for Democratic Renewal. The report stated that Metcalf had been a speaker at the 1984 convention of the neofascist Populist Party. Readers may recall that in 1988 the Populist Party nominated David Duke for president. In 1994 Metcalf was listed on the masthead of the *National Educator*, an anti-Semitic and racist magazine published by James Townsend. Metcalf states he has requested that Townsend remove him from the magazine's masthead and he disavowed the publication's racist views. While in the state senate Metcalf chaired the Natural Resources and Environment Committee. A long time opponent of Native American treaty rights, Metcalf used the position to battle the nomination of Curt Smitch to the directorship of the State Department of Wildlife. The Church Council of Seattle commented that "Anti-Indian groups, led by Senator Jack Metcalf, have used the issue as a launching pad for racist invective against Native Americans." Metcalf again denied being a racist.

The 1994 race for the 2nd district congressional seat pitted Metcalf against Harriet Spanel, a Democratic state representative. Backed by the Christian Right and the gun owner's lobby, Metcalf campaigned as a "Tough on Crime" pro death penalty candidate. What was hypocritical

WA Prisoners (cont.)

about this stance is that he used prisoners to do his campaigning for him.

The Washington Marketing Group (WMG) is a privately owned telemarketing (boiler room) business at the Washington State Reformatory (WSR) in Monroe, WA. WMG employs some 18 prisoners to do telemarketing. They are paid \$4.90 an hour of which some 55% is deducted to pay the cost of their captivity, taxes, crime victim compensation, etc. According to the February 4, 1995, edition of the *Seattle Times*, WMG owner Jim Paton called Metcalf's campaign manager, Chris Strow, ten days before the election and offered "polling services." The Metcalf campaign paid WMG \$9,000 to have prisoners call up voters in the second district and conduct a phony "poll."

WMG prisoners were provided with the names, addresses and phone numbers of 2nd district voters by the Metcalf campaign. Titled "Political Polling Project 1" the prisoners read a script stating in part "Hello, I'm calling from the Marketing group. I'd like to read you brief profiles of the candidates for Congress in the 2nd District and get your response. . ." The script sketches out Metcalf's and Spanel's positions on the death penalty (he's heavily for it), new taxes and compensation for property owners. Voters were then asked who they were now more likely to vote for on election day: Metcalf or Spanel. The prisoners did not tell voters that they were paid by the Metcalf campaign nor the fact that they were in prison.

Prisoners employed at WMG worked the phones for at least five days, right up until one in the afternoon on election day to encourage people to vote for Metcalf. Needless to say, they didn't mention any of Metcalf's past associations with racist and fascist groups. On election day the prisoners were treated to a video and other goodies for a job well done.

One of the first things Metcalf voted in support of, once esconced in the Congress, was HR 667 which aims to remove weights, televisions and what other small creature comforts remain from federal prisoners. This episode perfectly illustrates the hypocrisy of such tactics. When a prisoner watches television or lifts weights people on the outside aren't deprived of a TV or exercise. Yet when Metcalf takes jobs from the community and

sends them into prison, as he did in his campaign, someone in the community is deprived of a job. WMG, like all other private industry ventures in the Washington DOC, does not pay for rent or utilities. It pays its slave labor force minimum wage while employment ads in the *Seattle Times* say that telemarketers on the outside earn between \$6 and \$11 an hour. The prison laborers cannot organize a union, go on strike, get sick leave, etc. WMG does not pay health benefits, workman's compensation or any of the other costs normal employers who don't employ slave labor must pay. No wonder WMG was able to underbid any other competitors when hawking their services. WMG has conducted similar lobbying for politicians in the past but its usual clientele consists of the American Cancer Society, insurance companies, magazines, etc.

Of course, it is certainly ironic that politicians like Metcalf are willing to bash prisoners, quite literally kill us, yet at the same time turn a fast buck by using prison slave labor. It also doesn't say much about prisoners who will take their thirty pieces of silver to help elect the hand that has vowed to beat them. Indeed, Metcalf is already making good on his promise to make the lives of prisoners more miserable and he is able to make good on such promises due, in part, to prisoner slave labor.

One would think that a story like this would have the media jumping all over it. Think again. Shortly before the election in November is when I learned of Metcalf's using the prison boiler room to advance his political ambitions. His opponent, Spanel, was advised of this yet she did nothing about it. I informed Wayne Wurzer, a *Seattle Times* reporter about the incident and at first he told me it was a good story. A week later he told me he had discussed it with his editor and they decided "it just isn't newsworthy." The *Seattle Times* had endorsed Metcalf in both the primary and general elections. The information about his racist and fascist ties were all culled from *Seattle Times* articles from years past.

The story was initially broken by Ken Silverstein, editor of *CounterPunch*, a Washington D.C. investigative weekly. The story ran in the January 15, 1995, issue titled "Crime Buster: Metcalf's Secret Boiler Room." Metcalf wouldn't comment on the story when contacted. His press secretary Kevin McDermott told *CounterPunch* he had been in-

structed not to talk about the election. Asked why, he said it would violate federal law for him, as a congressional staff member, to discuss the election campaign. The Federal Election Commission and the House Ethics Committee said they were unaware of any such restriction. Metcalf's campaign co-chair Della Newman (George Bush's former ambassador to New Zealand) confirmed their use of WMG but denied knowing it used prison labor. She told Silverstein that if true, the story "raises a significant question" about Metcalf's public stance on crime.

On January 31, 1995, the story was broken locally in Washington state by George Howland, editor of *The Stranger*, a Seattle alternative weekly. Howland contacted WMG on-site supervisor Roy Harvey who confirmed the "polling" script. Both Harvey and the DOC confirmed that WMG has no other work sites outside of WSR, it is solely a slave labor operation. Harvey referred other inquiries to the owner, Jim Paton, who refused to make any comment through his attorney. Newman told Howland that she did not believe the campaign had done anything wrong and she was not troubled enough to contact Metcalf about the story for comment. Repeated inquiries by *The Stranger* for comment from Metcalf were ignored. Howland states: "It seems likely that Metcalf would like this story to be lost among the many curiosities that have marked his life as a public servant. Unfortunately, given the current crime hysteria, the American electorate might be ready to make campaign work mandatory for prisoners. Perhaps Metcalf will start trumpeting the fact that he beat his opponent by forcing hardened felons to do an honest day's labor."

On February 1, 1995, Howland's story appeared on Page One of the *Everett Herald*, which is the biggest paper in Metcalf's district. Both Silverstein and Howland cited myself as their source and included my comments in their story. On February 4, 1995, the *Seattle Times* ran the story on page one. In a classic case of media bias and distortion they managed to turn this into a prisoner bashing story (and they didn't do so by laughing at prisoners willing to campaign for someone like Metcalf in exchange for \$2.50 an hour and some donuts either)!

Times reporter Barbara Serrano contacted Ida Ballasiotes, the professional prison basher who chairs the state house corrections committee and got some

quotes from her. Ballasiotes stated that "Inmates shouldn't be doing any job that involves using information about the citizenry." However, if Serrano had bothered to look in the *Seattle Times* archives she would have encountered a 1989 article by then columnist Rick Anderson that discussed not only the WSR boiler room but the fact that Ballasiotes was exploring prisoner ties to the boiler room as part of a \$3 million dollar suit she had filed against the state because her daughter had been killed by a former WSR prisoner. Obviously Ballasiotes is and was well aware of prison boiler room operations in Washington yet she feigned ignorance about it when it involves one of her fellow "tough on crime" Republicans.

After the *Times* article appeared I contacted at least three *Seattle Times* reporters and editors to ask them why the Metcalf story wasn't "newsworthy" when I first told them about it back in November of 1994 but was newsworthy in February, 1995, but only after three other papers had run the story. To date no one has answered this question.

In the aftermath of the Metcalf story legislation was introduced in the state house which would make it a misdemeanor to use prisoners in political campaigns. The state senate introduced a bill which would require telemarketers to identify who had paid them when conducting political "polls" or other campaign work. Prison officials at WSR asked me if I wanted or needed "protective custody" from Metcalf's imprisoned supporters. I declined, noting that in eight years of captivity it's only been prison officials who have ever threatened or harmed me. WMG was shut down for a while, waiting for the "heat to die down" and is supposedly trying to change its name to something not associated with prison slave labor. WMG required all of its prison employees to sign non-disclosure agreements so that the next time they campaign for politicians linked to racists and fascists the public won't know about it. This exposes the dirty little secret of prison slave labor: politicians and capitalists want to make money off of it but don't want anyone to know about it.

My thanks to Ken Silverstein and George Howland for doing follow up investigation and breaking the story to the public at large. ■

Armed and Dangerous

By Raymond Luc Levasseur

When I was transferred to the U.S. penitentiary in Marion, Illinois in December, 1989, Panama was being invaded by U.S. forces. Amidst the wholesale destruction, mass graves, and lies by U.S. politicians and military leaders was an awesome display of American firepower designed to impose its will on yet another Central American nation. Weapons systems from land, sea, and air were utilized, along with the basic M-16 to kill whoever stood in the line of fire. Whether technologically advanced or as simple as a grenade, this war material is made in the U.S.A.—some of it by federal prisoners.

The Federal Prison Industries, Inc. (UNICOR) is one of the manufacturers that supplies military equipment to the bloated U.S. war machine. UNICOR has served this function since 1934 under contract to the War Department, now known euphemistically as the Department of Defense. The Federal Bureau of Prisons (BOP) boasts that the slave labor of prisoners, under hazardous conditions, and at an entry level wage of \$.23 an hour has and continues to make significant contributions towards supplying the military's needs. It also boasts of using UNICOR to control prisoners within its vastly overcrowded system.

UNICOR's military production ranges from TOW and other missile cables, munitions components, communications equipment, bomb parts, engine overhauls, uniform sewing, etc. In its brochures, the BOP proudly displays photographs of prisoners working hard producing this material. As a Viet Nam veteran, I was particularly struck by a photo of Federal prisoners producing equipment destined for Viet Nam. Unlike most prisoners, I got to see with my own eyes the lethal effect of the end product.

It is the priority of UNICOR to provide for the military's needs, whether it was during the Korean War when 80% of UNICOR sales went to the military, or the Gulf War when prisoners were pressed into overtime. In fact, the military has its own representative on UNICOR's Board of Directors to advise how to better harness prison labor for military purposes.

Being contracted to the War Department means supplying more than just U.S. forces. It means that this military equipment is rerouted by the U.S. to its

client states—from Israel to Indonesia—and into the hands of the worlds most degenerate and bloodthirsty regimes. In cases like El Salvador, the supplies were used to kill their own people.

USP-Marion is a control unit prison where abuse of prisoners is well documented by Amnesty International, Human Rights Watch, Congressional committee hearings, and other sources. In the never ending lockdown there is little to engage the intellect, an abysmal lack of stimulation and recreation, and no work with which to labor. With one exception. The prison administration has designed a scheme whereby prisoners deemed suitable must enter a period of involuntary servitude in the "pre-transfer" unit before approval is granted for transfer to a less brutal prison. It is a scheme the administration exploits to the hilt because they understand that Marion prisoners are desperate to leave its punishment cells, isolation, and tomb-like conditions.

While all federal prisoners are required to work, they are not required to work UNICOR, though 26% do. Most prisoners opt to work in other areas such as food service or maintenance, or pursue the very limited educational or vocational programs available. USP-Marion is the single exception in the Federal prison system because it mandates that prisoners work UNICOR as a condition of transfer. The only work at Marion's UNICOR is military production.

The Bureau of Prisons has parried Freedom of Information Act requests to disclose detailed information about war production at Marion. However, this much is known. UNICOR Marion produces electronics communication cables which it sells to the War Department. These cables are used in various ground vehicles, such as tanks and Armored Personnel Carriers, and production line supervisors have bragged that the cables are used in helicopters. During the Gulf War, the prisoners working UNICOR Marion were compelled to do overtime production. Whatever its finite specifics, the military applications of the electronics cables is essential to many weapons systems and platforms.

Marion's operation is an extension of a larger operation at the federal prison in Lexington, Kentucky, so its production and profit figures are not individually

Armed (cont.)

computed. In a typical year, Lexington fills 800-1200 orders for the military, totaling \$12 million.

In modern warfare, the term "military hardware" encompasses advanced weapons systems in which electronics often provide a more destructive function than the soldier's rifle. During the U.S. war on Iraq, for example, bombardment by electronically-enhanced munitions on water treatment plants spread a bacteriological assault on all those people whose lives depended on that water. According to the *New England Journal of Medicine*, 46,900 Iraqi children died in the first seven months of 1991 as a result of U.S. attacks on the country's infrastructure. Besides pilot and gunners who never see their victims, what's used to coordinate and propel mass destruction are the essential components of war, right down to the vital electronics and communications cables.

Military equipment is not produced in a vacuum. Those prisoners who produced material during the Viet Nam War certainly knew there was a war raging. U.S. military conquests, past and present, are well documented. Perhaps less well known, though equally significant and well documented, is the Government's diversion of weapons and military equipment to the serial killers disguised as heads of state. UNICOR's military production is part of an extensive pipeline that feeds the world's largest weapon exporter.

The U.S. has made much of China's use of prison labor for textile and other exports to the U.S. market. This is said to be a human rights abuse (i.e., that it cuts into the profits of U.S. corporations). The latest controversy revolves around Christmas tree ornaments manufactured by Chinese prisoners and exported to the U.S. To my knowledge no one has ever been killed by an attack from a Christmas tree ornament, yet tons of military equipment for which U.S. prisoners have provided essential components are exported to bomb, blast, and terrorize their ultimate recipients.

For me, being a revolutionary is the best way to live. Capture and imprisonment involve adjustments, but have not made me repentant for a life time of anti-imperialism and struggle for justice. I was sent to Marion because my political beliefs and associations and will likely remain here unless I repudiate them, which I will not do. For me to engage in the

production of military equipment as a condition for transfer would be a repudiation of my political beliefs and principles. *I will not do it.*

Refusing to be an accomplice to U.S. militarism is an act rooted deep in conscience and solidarity with those fighting U.S. imperialism, and trying to survive its onslaught. It is largely a symbolic act, yet necessary in confronting the collaborative nature of the system. During the recent attack against Lebanon by U.S. supplied Israeli forces, every newspaper, magazine, and newsreel image of the subsequent atrocities—hundreds killed and wounded; hundreds of thousands made refugees—shows a steady movement of U.S. manufactured weapons and equipment.

For the political prisoner, putting principles into practice may be largely symbolic, but demonstrating who we are and what we stand for is better than accommodating the government's agenda. It's important to remember that however small the resistance, someone always steps forward. The magnitude of crimes perpetuated by the U.S. must be opposed, and this cannot be done without risk and sacrifice. The lack of an organized and wider resistance, though lamented, does not negate individual and small group action. History is replete with their examples and their corpses: from the White Rose activists who opposed fascism to the first and few guerrillas of the Sandinista Front for National Liberation; from John Brown to the Industrial Workers of the World who were sent to prison in droves; to Malcolm X and the indomitable George Jackson. For each of them there are the countless unnamed. The only reward short of victory is the sustenance obtained from the spirit of resistance.

It is not a decision made without consequences. The government and Bureau of Prison's iron fist gives no quarter to revolutionaries, rebels, and dissenters. It's part of Marion's mission to destroy an individual's identity and community ties. One warden stated that "The purpose of Marion is to control revolutionary attitudes in the prison system and at large." Rather overstated from a bureaucratic windbag, but the fact remains that Marion is repression personified in a social experiment. Any outward indication that a prisoner does not conform to Marion's dictates and he is condemned to incessant isolation. For the transgressor there will be no relief—no step closer to personal freedom; no embrace of family and loved ones,

no access to expanded work, education, or recreational opportunities; no shot at parole. Added to the burden is the public's indifference and the response of the liberal left, who view prisoners with contempt and political prisoners with hostility.

Yet, through all the years and all its evil ways, Marion has not destroyed me. All that *can* destroy me are guards, medical neglect, or a prisoner that doesn't have his head screwed on right. There's an axiom here which declares that all who enter these walls will eat much shit before leaving. It's inherent in Marion's mission. But eating shit is qualitatively different than producing war material that's used to put someone else in their grave. Someone else who also experiences a steady diet of oppression. Someone who does me no harm.

It's been 26 years since I moved as a soldier among the Vietnamese people, rifle in hand, desecrating their land and seeing the ill, the infirm, wounded and dying of those I was assigned to enlighten - or light up - about the virtues of U.S. imperialism. After my discharge, I joined Viet Nam Veterans Against the War, a group of conscience ridden and war weary vets who rejuvenated a lethargic anti-war movement when the U.S. bombing of Viet Nam was at its extreme. Overlapping with Viet Nam was the war in America's streets, fought in places like Newark, Detroit, Pine Ridge, Attica, Humbolt Park, East L.A. Within *this* war were internecine battles provoked by police spies and provocateurs and the rapid proliferation of snitches in a drug saturated, me first society. And beyond S.E. Asia, U.S. wars of intervention left its bloody footprints in Chile, Argentina, Nicaragua, El Salvador, Angola, South Africa, Cuba and Puerto Rico, to name but a few. As in Viet Nam, the victims are mostly civilians.

Always at war, the world's policeman, this omnipotent and ubiquitous United States military is charged with enforcing capitalism's code of conduct. Troops were mobilized during the rebellion in Los Angeles. Troops are deployed in Somalia where they now stand accused of human rights violations by the humanitarian relief agencies and the Somali people themselves.

Viet Nam changed my view of liberation to mean a constant and protracted struggle against those forces that impose their will on others for power and profit. Freedom is the ultimate expression and condition of a people who control their own destiny. Once before, the govern-

ment put me in uniform and used me for military purposes. Being young and naive was no excuse for my complicity. They'll not do it again. ■

Reader Mail

Correction on Clinton

I am writing about the article on page 11 of the October issue of *PLN* (Vol.5 No.10), "Bias in Military Death Penalty." While I agree with your prediction that Clinton will sign the death warrants [to execute military prisoners], your article stated, "As Governor of Arkansas, Clinton never granted a petition for clemency." This is not accurate.

Clinton was against the death penalty when he won his first term as Governor. During that term he granted clemency (and had released from prison) a man who [later] committed a few very brutal murders. He was lambasted by the media on this issue, and lost the bid for a second term. When he ran again and won he then supported the death penalty.

To me the above information makes his support (during the Presidential campaign) for the execution of a mentally retarded man even more contemptible because he knows better!

Bush did a similar about-face on pro-choice in 1980 when he was running for the Republican nomination. He was strongly pro-choice. As soon as Reagan got the nomination and asked him to be Vice President, he flip flopped to the anti-choice position. (I refuse to buy into the term "pro-life.")

N. S. C., Seattle WA

N.S. Seattle

Ohio Activist Needs Help

by John Perotti

Readers of this paper will recall my article "Spilt Milk", detailing human rights abuses at the Southern Ohio Correctional Facility (Luke) located in Lucasville, OH and how I was set up in retaliation for witnessing the beating of an inmate and writing about it. This retali-

ation was also due to my working with my Brother, Little Rock Reed, in exposing the Ohio DOC's instigation of the Easter 1993 uprising here, resulting in an 11 day siege where 9 prisoners and 1 guard died.

As a result, Ohio got the FBI to arrest Little Rock in New Mexico, on a Governor's Warrant, and fabricated charges against me in order to place me in isolation. Your response to this set up, combined with my hunger strike, and a filing of a Motion For a Temporary Restraining Order with Federal Judge S. Arthur Spigal, resulted in a reversal of the infraction and my being released back into population.

In the meantime, we assisted Little Rock by obtaining affidavits showing that his life would be in danger if he was returned to Ohio, as well as providing him case law. 8th Dist. Federal Judge Nelson granted Little Rock's Writ of Habeas Corpus, releasing him from custody, and declaring that Ohio prisoncrats acted illegally in obtaining Little Rock's arrest in order to silence him from speaking out against Ohio prison conditions, and agreeing that his life would be endangered if returned to Ohio! I personally spoke to Little Rock on the day of his release. I have also been working with our Brother Abd'al Bari, on coordinating efforts to monitor the Ohio Control Units and SuperMax. Suddenly Abd'al was arrested on fabricated charges and the FBI accusing him of plotting to break out prisoners. The Peacenet shows increased activity in Ohio and Indiana of the Feds searching activists homes.

Well, I'm writing this in the hole, being charged and convicted by the Rules Infraction Board of "conspiracy to convey drugs" and "possession of money", and recommended to go back to the Control Unit. The State highway Patrol, Chief Investigator Ison, working with Lt. Schramm (same one who was involved in the last set up—and a losing defendant in our lawsuit where we had Amnesty International investigate human rights violations at Luke) engineered this retaliatory set up. This time making the allegation that I "conspired" with a prison collaborator to smuggle drugs in—rather than out of prison. The collaborator then said I gave him \$100 cash while in the hole, to purchase a bag of coffee and 2 packs of cigarettes. The collaborator they're using has been a known informant for 4 years—he testified against 2 convicts in murder

cases by using his paralegal title to gain information, then testified for the prosecution. His name is Robert Parks—everyone I know is hip to him. He's working with prisoncrats in an effort to corroborate their charges against me. By saying the drugs were coming in this time, rather than going out, prisoncrats say they are using a different administrative regulation that gives them more protection legally, or so they think. I was picked up the day after receiving a copy of Little Rock Reed's habeas decision. The day before I was threatened by 2 different guards on separate occasions, so should have known something was coming. *Prison Legal News*, which just printed "Spilt Milk" came out last week and the article has been declared "inflammatory" at Lebanon Prison and here, as it was when *Prison News Service* printed it. So the arrival of *PLN* at Luke just fanned the flames of malcontent in the prisoncrats, precipitating this most recent string of reprisals. [*PLN* was eventually delivered to OH readers.]

I reported long ago that Ohio has coordinated efforts with local and national law enforcement agencies to label us as "Security Threat Groups", as well as placing this label on those they say are gang members. It's obvious that they are working closely with the FBI and coordinating efforts to suppress our legitimate and legal activities to monitor control units, write informative articles on what is happening inside our gulags, and going all out to wage war on our activists. Little Rock is FREE, and that pissed them (prisoncrats) off!

So, here I sit. My attorneys are not enthused about moving for another transfer. I have asked for an Out of State Transfer to Monroe Reformatory in WA state per the Interstate Compact. I urge all of you to fax, call, and write Governor Voinovich and urge him to transfer me per the Interstate Compact, and release me from isolation:

Governor George Voinovich
Vern Riffe Center
77 South High St., 30th fl.
Columbus, OH 43266-0601
ph: (614) 466-3555, fax: (614) 466-9354

[Editors' Note: John is going on a "Death Fast" (a hunger strike) starting June 1, 1995, to press for his transfer out of Ohio. Please support him in any way you can.]

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9th Circuit Affirms Court Access Case

In a wide ranging ruling, a unanimous panel of the ninth circuit court of appeals affirmed most of a lower court ruling designed to ensure Arizona prisoners' right of access to the courts. In the May 1994 issue of *PLN* we reported *Casey v. Lewis*, 834 F. Supp. 1553 (DC AZ 1992) which held that the Arizona DOC's law libraries and legal assistance programs violated prisoners' right of access to the courts. Specifically, the court held that the following areas were constitutionally deficient: the contents of the law libraries; the access to the libraries; legal assistance for prisoners who were illiterate or non-English speaking; library

staffing; the indigence standard in order to receive legal supplies; the photocopying policy that allowed the confidentiality of legal documents to be breached and limitations on prisoners' phone calls to their attorneys. After appointing a special master to assist in developing proper injunctive relief the court issued a permanent injunction requiring the ADOC to implement the legal access plan devised by the special master. The ADOC appealed, challenging the district court's findings of fact and conclusions of law, the scope of the injunctive relief ordered and the requirements that the ADOC pay the Special Master's fees without being given an opportunity to object.

Bounds v. Smith, 430 US 817, 97 S.Ct. 1491 (1977) firmly established prisoners' constitutional right of access to the courts. "The importance of this right cannot be overstated. It is the right upon which all other rights depend." This right ensures that no person will be denied an opportunity to present to the judiciary allegations concerning the violation of fundamental constitutional rights. To discharge their duty of assuring prisoners' right of meaningful access to the courts, states must assist prisoners in the preparation and filing of meaningful papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. To determine the constitutional adequacy of a legal access program district courts must evaluate the program "as a whole," emphasizing that 'meaningful access to the courts is the touchstone.'"

The court held that the lower court correctly applied the relevant case law in concluding that the ADOC's legal program unconstitutionally denied prisoners

meaningful access to the courts Under *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981) the court held that the state has the burden of providing meaningful access and to demonstrate that its chosen method is adequate.

The court agreed that the contents of ADOC law libraries were inadequate because volumes of various reporters as well as the pocket parts to various secondary sources were missing. "Updated inventories are unquestionably an essential element of an adequate library system." "Several libraries also do not contain self-help manuals to instruct inmates on how to use the law books. The complexities of legal research at the very least require these aids to enable inmates to use the books effectively. As the court in *Bounds* mandated, access must be 'adequate, effective, and meaningful.'"

With regards to physical access to the law libraries, the court said prison officials can regulate the time, place and manner in which library facilities are used. Applying its previous ruling in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986) the court held "unless ADOC can demonstrate actual security risks, an inmate should be allowed access to the law library. The district court correctly concluded that ADOC may not routinely prohibit lock down inmates from physically using the law library. Access to the law library's books is crucial because as we explained in *Toussaint*, legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance

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Court Access (continued)

discovery of an obscure or forgotten case."

"For those inmates deemed security risks and denied access to the library, *Bounds* requires the state to provide legal assistance." The lower court did not abuse its discretion in concluding the legal assistance provided by ADOC was constitutionally deficient. "In some facilities officials do not require inmate applicants to possess any qualifications aside from a literacy in English. In others, the tests developed to assess the applicants' qualifications do not test for skills in legal research and writing, nor do the officials administer the tests to all the applicants." No training is provided to the legal assistants, which directly contravenes the holding in *Bounds* that "legal assistance must be provided by persons 'trained in the law.'"

Of great significance given the large number of non-English speaking prisoners incarcerated around the country, the court held "Sufficient numbers of trained legal assistants must be provided to prisoners who are functionally illiterate or whose primary language is not English. It goes without saying that 'a book and a library are of no use, in and of themselves, to a prisoner who cannot read.' ADOC's failure to provide bilingual legal assistants or law clerks in many of the facilities denies non-English speaking inmates meaningful access. The reliance upon fellow prisoners who are not trained in the law simply does not suffice as an adequate substitute. As the district court found, these fellow prisoners frequently cannot comprehend nor translate legal terminology." Extensive discussion was given to the obligation of prison officials to provide legal assistance to illiterate and non-English speaking prisoners and the reasons and case law requiring it.

In addition to legal assistants, the ADOC is obligated to staff its law libraries with library staff that have at least some basic knowledge of legal research. Staffing law libraries with prison guards who are untrained in maintaining a law library is not acceptable.

The ADOC indigence policy allows prisoners to obtain free legal supplies only if their account balance does not exceed \$22 per month. The district court held this was inadequate because basic hygiene supplies cost more. This issue

was not included in the plaintiffs' complaint but was tried anyway. In *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991) the Arizona district court had held a previous Arizona DOC indigence policy was unconstitutional and set a more realistic policy of \$46. The court incorporated its ruling in *Gluth* into this case. The ninth circuit vacated this part of the ruling because "the district court did not make a specific finding that ADOC's indigence standard was inadequate for this plaintiff class."

The ADOC photocopy policy requires that prisoners give their legal pleadings and exhibits to staff to be photocopied. The court held that this compromised the confidentiality of the documents and violated prisoners' right of access to the courts.

The court also held invalid ADOC rules limiting prisoners' ability to call their attorneys. Among the illegal rules were those requiring the prisoner to divulge the nature of the call, granting of calls based on prison risk score rather than need and limiting calls to issues relating to a prisoner's sentence. The ap-

peals court rejected the defendants' argument that to state a claim the plaintiffs had to show an actual instance where their court access had been impeded.

Addressing the defendants' objections to the scope of the injunctive relief ordered, the court noted that once constitutional violations are found the courts retain wide latitude in fashioning remedies designed to cure the constitutional harm. The lower court ordered the ADOC to purchase *Pacific Reporters and Digests*. This was reasonable because many ADOC prisoners are serving time for crimes committed in neighboring states and will need the law from those states. This law is contained in the *Pacific Reporters* but not in the *Arizona Reports*. The court also noted that when shepardizing Arizona cases, researchers are often referred to other cases from the Western United States.

The lower court ordered ADOC to provide physical access to the law libraries absent a showing that the prisoner is a security risk. This was affirmed. "The order seeks to prevent the arbitrary denial of access to the library, thus prison offi-

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cials would be in compliance with the order if they can rationally justify a particular denial." Likewise, the court order that law libraries remain open at least fifty hours a week was reasonable. While ADOC had expanded its hours of law library operation the court held that there was no guarantee, absent an injunction, that the ADOC would not revert to its prior practices.

The court affirmed the injunction which requires DOC to provide legal assistance to prisoners who because of language factors, lack of law library access or other reasons, are unable to perform adequate legal research and writing. Also affirmed was the requirement that law library staff be professionally trained librarians who possess either a library science degree, law degree or paralegal degree. "While we express no opinion on whether the librarian should be trained in the law, at the very least, it is not unreasonable to ensure that the librarian is in fact trained for the demands of his or her job through the requirement of a library science degree and a basic knowledge of legal research."

The court remanded the defendants' increase of photocopying charges from five to eight cents a page to determine whether the increase was justified. It affirmed the injunction requiring a sign be posted next to the copying machine directing staff not to read prisoners' legal materials. The court affirmed the injunction requiring prisoners be allowed at least three twenty minute phone calls a week to attorneys.

The court agreed that the defendants should have been given an opportunity to object to the special masters' fees before being required to pay it. This issue was remanded to the lower court for further proceedings.

This ruling is extremely important in affirming prisoners' right of meaningful access to the courts as well as the states' affirmative duty to ensure that right. The court's ruling also reprints the lower court's order in its entirety, as an appendix. The appendix is extremely detailed and should give litigants pursuing this topic an idea of the relief available when a constitutional violation is shown. While this is an excellent ruling it goes to show what a crapshoot the appeals courts have become. Past issues of *PLN* have reported such disastrous rulings on this very issue as *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993) which allowed ADOC officials to deny prisoners contact visits with their

attorneys and *Vandelft v. Moses*, 31 F.3d 794 (9th Cir. 1994) which, contrary to the above ruling, held prisoners did not have a right of physical access to the prison law library. This ruling, by the way, acknowledged *Vandelft* but held the issue was not before them because actual injury was not an issue in this class action suit. See: *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994). On May 22, 1995, the U.S. Supreme Court granted certiorari to hear this case. It is docket number 94-1511, we will report the outcome. ■

No Immunity for Cold Filthy Cell

Melvin Wilson is an Illinois state prisoner. He filed suit under 42 U.S.C. § 1983 claiming he was discharged from his prison job due to his race and when placed in segregation he was placed in a filthy, roach infested, leaking cell whose toilet was covered with feces. The defendants moved for summary judgment which the court granted in part and denied in part.

The court dismissed Wilson's claims concerning the loss of his prison job by noting that prisoners have no right to a prison job or other employment in prison. However racial discrimination in state prisons violates the fourteenth amendment and is actionable under §1983. The court held that there was no evidence to indicate that Wilson was reassigned due to his race. The job reassignment did not violate the due process clause because Illinois prisoners have no right to a prison job.

Turning to Wilson's eighth amendment claims the court dismissed the claims pertaining to the cell containing dirt, dust and roaches and that it leaked during rainstorms holding that such conditions do not violate the eighth amendment. [Editor's Note: Past issues of *PLN* have reported that vermin infested cells do violate the eighth amendment see *PLN*, Vol. 5 No. 7.] Likewise the allegation of having only a urine and feces stained mattress to sleep on did not state a claim for an eighth amendment violation because Wilson did not allege any harm from the mattress or the above cell conditions. The court also dismissed the claim that Wilson's segregation cell did not have working electrical lighting. "Without an allegation of more—such as total light deprivation, we find that inadequate lighting does not so offend 'the

evolving standards of decency that mark the progress of a maturing society.'"

The court did not dismiss the claim that the cell's toilet had feces on and around it and prison officials refused to provide him with cleaning materials. The claims were sufficiently detailed and serious to state a claim for a violation of the eighth amendment and because the state did not dispute the allegations the court held that a genuine issue of material fact existed as to whether the defendants acted with the requisite intent to violate the eighth amendment.

The court held that Wilson had also stated a claim that he was placed in an unheated cell for three days in January 1992. Numerous court rulings have held that denying prisoner adequate heating violates the eighth amendment. "Failure of the prison's heating system during the month of January is a condition defendants would be expected to know of and rectify through the distribution of blankets, reassignment of inmates to other cells or some other measures. Instead of showing such action on their part defendants merely assert that the 'heating system was subsequently repaired...'." This did not meet their burden of proof in moving for summary judgment.

The defendant prison officials moved for qualified immunity on the claims. Addressing only those claims which it had not dismissed the court denied their motion for qualified immunity. The court held that the law was well established that placing a prisoner in a cell with a feces covered toilet and denying him cleaning materials and exposing prisoners to cold violated the eighth amendment. Thus the defendants are not entitled to qualified immunity for their actions if Wilson prevails at trial. The court cites several cases on these issues. See: *Wilson v. Schomig*, 863 F. Supp. 789 (ND IL 1994). ■

MO Hair Cut Rule Violates RFRA

In the June, 1994 issue of *PLN* we reported passage of the Religious Freedom Restoration Act (RFRA) 42 U.S.C. § 2000bb and predicted that many state's "grooming rules" which ban beards long hair etc. would likely be found unlawful under it. While we have reported several RFRA cases since then, virtually all of them

Haircuts (cont.)

victories for the prisoner plaintiff, the first haircut ban has been struck down.

Mark Hamilton is a Native American prisoner held in the Missouri state prison system. He filed suit in order to practice his Native American religion, specifically he challenged the lack of sweat lodge ceremonies, being forced to cut his hair, being denied sweet grass, feathers, beads, necklaces and other items necessary for his religious practices. During the pendency of the litigation the RFRA was signed into law and the court ruled on this case on the merits under the RFRA.

The court discussed the RFRA and noted that it was specifically applicable to prison litigation. It also noted that the Missouri DOC practices challenged in this case had previously been upheld as constitutional in other pre-RFRA cases. Proceeding to the merits of the case the court held that Hamilton had stated a claim for relief and prison officials had failed to show that their hair cut rules and denials of sweat lodges etc. furthered any compelling governmental interest in security or safety.

The court noted that other maximum security prisons in various states allow sweat lodge ceremonies without compromising prison security. The court noted that female prisoners in Missouri are allowed to have long hair, moreover, no evidence was presented that identification of prisoners with long hair was a problem nor was any evidence shown that anyone has actually hidden contraband in their hair.

In finding the defendants' actions unreasonable the court emphasized that they did not make any inquiry into the problems their policies posed for practitioners of Native American religions; they did not contact any Native American religious leaders to discuss the feasibility of Hamilton's requests nor did they conduct a cost analysis of the funds required to comply with Hamilton's requests.

The court ordered that "defendants be enjoined from enforcing against plaintiff hair length regulations and grooming policies which burden the exercise of Plaintiff's Native American religion." The court also ordered that weekly sweat lodge ceremonies be made available as well as other actions needed to allow Hamilton to practice his religion. The court also awarded attorney fees. See: *Hamilton v. Schriro*, 863 F. Supp. 1019 (WD MO 1994).

Volume 9, No. 4 of the *National Prison Project Journal* had a lengthy article on legal developments in prison litigation under the RFRA. It cites numerous cases decided under the RFRA discusses legal standards and litigation strategy. Their address is listed on page 20 of this issue of *PLN*. ■

Excessive Force Jury Instructions Affirmed

Robert Baker is a Missouri state prisoner. He filed suit under 42 U.S.C. § 1983 claiming that his eighth amendment rights were violated when prison guards swept garbage and water into his cell after which he fell and injured himself. While being taken to the prison hospital he was injured when guards dragged him.

After a three day trial a jury returned a verdict in Baker's favor finding one guard liable for the cell conditions and five guards liable for the excessive force claim. They awarded Baker \$1 in nominal damages for each claim and \$100 in punitive damages from each of the defendants liable on the excessive force claim. The defendants appealed claiming that the district court had erred in giving jury instructions on the excessive force claim and that the evidence was insufficient with regards to the cell conditions claim. The court of appeals for the eighth circuit affirmed with regards to the excessive force claim and vacated and remanded on the cell conditions claim.

The trial court gave the jury instructions on the excessive force claim that included a requirement that the force was applied "maliciously or sadistically." At the time neither party objected to the instruction. The defendants themselves offered an instruction practically identical to that used. The instruction actually used was the eighth circuit's model instruction for excessive force claims at the time. After the trial the appeals court decided *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993) which reversed a jury verdict on an excessive force claim because the jury instructions did not include language with respect to maliciousness as a factor for the jury to consider. Analyzing the instructions at issue in this case the court held that no error had occurred and affirmed the judgment on the excessive force claims.

The court vacated the jury's verdict with regards to the cell conditions claim. The court held that as a matter of law Baker had not stated an eighth amendment claim because he did not show there was a substantial risk of actual harm by having guards sweep water and trash into his cell. The court noted that Baker did not present evidence as to how much water and trash were swept into his cell nor that the guard comprehended the risk he was subjecting Baker to. See: *Baker v. Delo*, 38 F.3d 1024 (8th Cir. 1994). ■

Turner Applied to Rehabilitation Act Claims

Prisoners at the California Medical Facility (CMF) in Vacaville filed a class action suit challenging the adequacy of medical care and the overall treatment afforded to prisoners at the facility, especially those who were HIV positive or had AIDS. Before trial the parties entered into a consent decree in which the California DOC agreed to make numerous changes in how medical care and treatment were provided. A subclass of prisoners certified in the class action suit are those who are HIV+, confined to wheelchairs or mentally ill. The subclass claims were brought under § 504 of the Rehabilitation Act (RA) of 1973, 29 U.S.C. § 794.

The consent decree provided that the CDC would provide adequate staffing for the prison. The defendants claimed they had adequate staffing already. A prison staffing expert concluded that at least 36 new staffing positions needed to be added. The parties attempted to mediate the matter and the mediator concluded that at least 12 new positions were needed. The matter went to the district court which concurred with the mediator's recommendation and ordered the additional staffing. The CDC appealed to the ninth circuit. The issue on appeal was whether the decree required staffing from a bare minimum constitutional perspective or from a correctional perspective. Analyzing the language of the consent decree, the court held that the lower court had correctly concluded that the decree did not establish a bare constitutional minimum standard and upheld that portion of the district court ruling.

The prison officials at Vacaville had a policy whereby HIV+ prisoners were segregated and denied jobs and program

access. The consent decree mandated that the CDC establish a program whereby HIV+ prisoners were placed in the prison's general population. The only issue which was not resolved in mediation was that the CMF insisted on maintaining a blanket policy excluding HIV+ prisoners from preparing or serving food. The district court issued an order forbidding the defendants from denying employment to HIV+ prisoners in food service jobs. The court held that the policy of denying food service jobs to HIV+ prisoners violated the Rehabilitation Act.

In its order the lower court set out a criteria by which HIV+ prisoners could be held in segregation, namely a documented history of engaging in high risk behavior such as engaging in oral or anal sex and assaults during which the HIV+ prisoners bleeds and inflicts an open wound on another. HIV+ prisoners can be held in segregation if prison officials have reasonable cause to believe a prisoner will engage in oral or anal intercourse or engage in assaultive behavior intended or likely to inflict open wounds on others.

The appeals court held that the Rehabilitation Act applied to prisons and covered HIV+ individuals. While not at issue in this case the court also held that the Americans with Disabilities Act (ADA) 42 U.S.A. § 12101(2) also applies to prisons and people who are HIV+. The court gives a useful discussion of both the RA and ADA and the elements needed to states a claim under their provisions.

In a serious dilution of the RA the court held that because Congress did not intend the RA to be applied to prisons, reviewing courts should modify the statutory construction afforded to RA claims. "It is highly doubtful that Congress intended a more stringent application of the prisoners' statutory rights created by the Act than it would the prisoners' constitutional rights. Thus, we deem the applicable standard for the review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting, as outlined by the Supreme Court in *Turner v. Safley*, 482 US 78, 107 S.Ct. 2254 (1987). The Court stated: '[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests....' This is equally applicable to the statutory rights created by the Act."

Applying this standard to the practice of banning HIV+ prisoners from holding food service jobs, the court then stated

that the practice was acceptable within the watered down version of the RA they had just outlined. Prison officials argued that prisoners might riot or rebel if their food was served by HIV+ prisoners despite the fact that it was extremely unlikely that the virus could be transmitted via food service. The court held that it was sufficient that HIV+ prisoners were given an opportunity to be housed in general population and allowed to hold all jobs except those in food service areas. "Under the standard of review announced in *Turner*, deference is due to the prison authorities policy not to open food service jobs to HIV-infected inmates." This portion of the lower court order was reversed. The case also gave a lengthy discussion of attorney fee awards in consent decree litigation. The case was remanded to the lower court for further proceedings. See: *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994). ■

Pen, Photocopies and Exercise Must Be Provided

Prisoners held in segregation and control units have a clearly defined right to court access, which includes proper writing materials and adequate writing materials. They also have a well defined right to outdoor exercise. John Allen and Terry Smith are Hawaii state prisoners held in a control unit. During a six week period they were only provided with 45 minutes of outdoor exercise per week. They filed suit claiming that this denial violated their right to be free from cruel and unusual punishment. Smith also claimed he was denied his right of access to the courts because prison officials refused to provide him with access to a pen and to photocopies for his litigation. The defendants filed a motion for summary judgment which the district court denied, they also claimed they were entitled to qualified immunity for their actions and the court disagreed with this contention as well. The court of appeals for the ninth circuit affirmed the lower court ruling.

Analyzing the denial of exercise claims the court held that it is long established law that prisoners must be provided with an opportunity for at least one hour a day of outdoor exercise. The court discusses numerous cases from several circuits dealing with this issue, including those that involve long term segregation

prisoners, where the deprivation of outdoor exercise constituted cruel and unusual punishment. Thus, the defendants were not entitled to qualified immunity for providing Allen with only 45 minutes of exercise a week. Allen has litigated and won this issue before in *Allen v. City and County of Honolulu*, 39 F.3d 936 (9th Cir. 1994). The January, 1995, issue of *PLN* extensively discussed prisoners' right to exercise as well.

Smith claimed that prison officials violated his right of access to the courts when they refused to photocopy his court papers despite his willingness to pay and by providing only a pencil rather than a pen with which to draft his legal pleadings. At the time Smith was seeking to file a petition for post conviction relief in state court. The state trial court retained his petition because he failed to include two additional copies of the petition. Smith claimed this failure was due to prison officials' refusal to make photocopies of his petition. He was eventually able to file his petition, which was dismissed.

When he attempted to appeal the dismissal of the petition the state appeals court returned it to him because court rules require that all court pleadings be submitted in black ink. The Hawaii prison system does not allow its captives to have pens. The state supreme court affirmed dismissal of the appeal as being untimely.

The court of appeals held that prisoners have had a well established right of access to the courts, which includes a right to services and supplies indispensable to filing court documents. See: *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977) and *Wolff v. McDonnell*, 418 US 539, 94 S.Ct. 2963 (1974). The court noted that while the ninth circuit had not specifically held that "some means of accurate duplication" is an essential component to prisoners right of access to the courts, other circuit courts had. Both *Jones v. Franzen*, 697 F.2d 801 (7th Cir. 1983) and *Johnson v. Parke*, 642 F.2d 377 (10th Cir. 1981) held that prison photocopy policies that denied prisoners copies infringe prisoners' right of access to the courts.

While public officials are not charged with a detailed knowledge of law to predict the course of constitutional law, they are required to comply with law that is well established or obvious. "...it does not require sophisticated 'legal scholarship' to know that a plaintiff's access to the courts could be hindered seriously by an

Pen, Photocopies (cont.)

inability to make multiple, accurate copies of legal documents.”

The court held that prison officials should have known they had a legal duty to provide Smith with a pen because in *Bounds* the supreme court held that prison officials had an “indisputable” duty to provide prisoners access to “paper and pen to draft legal documents.” Because Hawaii court rules require “that all ‘handwritten entries on legal papers shall be in black ink,’ and defendants concede that this mandate was ‘clear and explicit’ and provided no exceptions. In light of the clarity of preexisting law, it should have been apparent to the defendants that a ban on the use of pens would seriously hamper an inmate’s access to the courts and therefore constitute a violation of his rights under *Bounds*.”

The appeals court also rejected the defendants’ contention that Smith had to allege that the denial of pen and copies actually prejudiced his right of access to the courts. “We agree with the district court that Smith’s allegations are adequate to defeat summary judgment: he has alleged conduct on the part of defendants that, if true, violates clearly established constitutional rights, defeating defendants’ claims to qualified immunity at the summary judgment stage. Whether Smith ultimately establishes his claims of actual injury and damages is another matter.” The court remanded the case to the lower court for trial. See: *Allen v. Sakai*, 40 F.3d 1001 (9th Cir. 1994). The appeals court issued another ruling modifying the portion of its ruling dealing with the provision of writing materials to Smith. The outcome of the case was not changed. See: *Allen v. Sakai*, 48 F.3d 1082 (9th Cir. 1994). ■

Retaliatory Infractions Illegal

Prison employees are forbidden from filing false disciplinary charges against prisoners in retaliation for prisoner complaints against other employees. Milton Payne, a New York state prisoner, witnessed a prison guard set a fire in a cell and reported this to prison authorities. Shortly thereafter prison guards searched Payne’s cell and claimed to have found a single edge razor blade in his cell. They infringed Payne for weapons possession. He was found guilty at the hearing.

Payne filed suit pursuant to 42 U.S.C. § 1983 claiming that the retaliatory infraction violated his right to due process. He also alleged numerous due process violations arising from the disciplinary hearing itself. The district court dismissed, on the defendants’ motion for summary judgment, all the claims arising from the hearing.

The court did not dismiss, and set for trial, the retaliation claims. “Plaintiff’s claim that Officer White framed him in retaliation for reporting officer Telesky must survive. Under *Freeman v. Rideout*, 808 F.2d 949, 951 (2nd Cir. 1986), the filing of false charges is normally not actionable under Section 1983. *Franco v. Kelly*, 854 F.2d 584, 589 (2nd Cir. 1988), however, held that a prisoner stated a valid claim against prison guards alleging that the guards falsely accused the prisoner of insubordination in retaliation for the prisoner’s cooperation with authorities investigating abuse of inmates. The plaintiff here similarly asserts interference with his right to petition for redress of grievances, and thus states a claim. Furthermore, there is a genuine issue of material fact as to whether CO White did retaliate against plaintiff.”

The court held that the defendants were not entitled to qualified immunity on the retaliation claim because *Franco* constituted well established law at the time the events in this case arose. Hence they knew or should have known it was illegal to retaliate against prisoners who complained of guard misconduct. See: *Payne v. Axelrod*, 871 F. Supp. 1551 (ND NY 1995). ■

Delay in Hearing States Claim

The court of appeals for the second circuit has reaffirmed that New York State law creates a due process liberty interest in its administrative segregation rules. The court held that prisoner’s due process rights are violated when they are not afforded a timely hearing as mandated by state law. Anselmo Soto, a New York state prisoner, was placed in ad seg after being infringed for drug use and possession. The disciplinary hearing was not held until two weeks after the misconduct allegedly occurred. New York state law requires that disciplinary hearings be held no later than seven days after the misconduct occurs. Soto was found guilty at the hearing and the finding was upheld on administrative appeal. Soto filed a habeas

petition in state court contending the delay violated his due process rights. The state court agreed and ordered the infraction expunged.

Soto then filed suit in federal court pursuant to 42 U.S.C. § 1983 seeking money damages contending that the delay in his hearing violated his federal due process rights. The district court dismissed the complaint for failing to state a claim. The court held that New York code § 251-5.1(a), mandating the commencement of disciplinary proceedings within seven days, did not create a federal constitutional claim. The court of appeals for the second circuit reversed and remanded.

The appeals court noted that prisoners have no federal constitutional right to remain free from segregation, however in numerous rulings it has held that New York state laws concerning segregation, disciplinary hearings and keep lock create a federal due process liberty interest which can be enforced in federal court. The court examined Soto’s pleadings and held that it was apparent Soto claimed he had not been given any hearing until fifteen days into his administrative segregation. The court noted that even a seven day delay in at least one ad seg hearing violated due process for New York state prisoners. The court held that Soto had stated a claim upon which relief could be granted and remanded the case back to the lower court for further proceedings. See: *Soto v. Walker*, 44 F.3d 169 (2nd Cir. 1995). ■

WA Powell Update

by John Midgley

This is to update you on recent developments in the *Powell* case on retroactive application of SHB 1457 to mandatory life term prisoners.

As you know, earlier this year the Ninth Circuit refused to rehear the case. So, on April 10, 1995, we filed a petition for *Writ of Certiorari* in the United States Supreme Court. On April 25, the Supreme Court decided *California Department of Corrections v. Morales*, which involved a California statute that allowed the parole board to see prisoners for reconsideration of parole less frequently than the board had to see them under the law at the time of the crime. The Court emphasized, however, that the California law had no effect on first opportunity for parole. Since SHB 1457 did affect the first opportunity for parole,

we believe *Morales* should not be dispositive and so the Supreme Court could still take *Powell*. We have sent a short supplemental brief to the Supreme Court making the point that our claim is an issue left open by *Morales*.

The process from here is as follows. The State has until May 10 to respond to the Petition. We then can reply if we choose, and will do so quickly because the Court does not wait long for a reply before preparing to decide whether to take the case. The Court can grant *certiorari* and take the case, remand the case to the Ninth Circuit for further consideration, or deny *certiorari*. If our petition for *certiorari* is denied, then the Ninth Circuit decision will stand.

We do not know when the Supreme Court will decide what is next. The Court might decide before summer, or a decision might be delayed until fall. (The Court does not generally decide during the Summer whether to take a case.) When something happens, you will be informed.

Thanks to all who have sent information about their individual situations and attempts to get action under RCW 9.95.052. I am sorry I have been unable to respond directly to most of you. We are still reviewing the information to see who (if anyone) gets early parolability hearings and under what circumstances, to determine if there are further legal issues that should be raised. Thank you for your patience, and we will be in touch as soon as possible about whether we think there are further legal issues to pursue. [Editor's Note: The July 1995 issue of *PLN* will discuss *Morales*.]■

WA Prisoners Protest HB 2010

The May, 1995, issue of *PLN* detailed the March 20, 1995, protest by prisoner's family members and prisoner rights supporters in front of the King County jail in Seattle. It also mentioned that women prisoners at Purdy had staged a one day strike in support of the outside demonstration. The objective of the inside and out demonstrators was to protest the Washington state legislature's hateful anti-prisoner and anti-family legislation aimed at taking the Extended Family Visiting program, charging prisoners for medical care, taking prisoner's money, etc. Other protests, ignored by the corporate media, took place on that day as well.

The *Walla Walla Union Bulletin* reported on March 21, 1995, that the day before some 360 prisoners in two housing units in the main, close custody section of the Washington State Penitentiary had stayed in their cells and foregone meals and had not reported to their work assignments. [Close custody prisoners have already lost their EFVs due to a new Division of Prisons policy that in many respects is harsher than the proposed legislation.] Citing the fact that only some of the WSP prisoners had honored the strike WSP warden Tana Wood was quoted saying "The majority of the inmates understand that's not a way to give a message to the legislature." She did not suggest a better way. But obviously peaceful protest will not be tolerated by the DOC.

One *PLN* reader at WSP wrote: "It seems on Monday, March 20th about 500 prisoners stayed in their cells, did not work, eat, etc. At about 4:30 PM that day I was placed in segregation pending an investigation per order of Captain Morgan. About 150 major infractions were given out over this. I understand the thing was over the loss of Extended Family Visits and House Bill 2010." We have also received unconfirmed reports that prisoners at McNeil Island were also repressed before and after the March 20, 1995, demonstration.■

Bye Bye Mike

Mike Padden, the dimwitted Republican state representative from Spokane, has long been a nemesis of Washington state prisoners. In 1995 Padden introduced legislation to ban family visiting, televisions, "erotic" and "violent" materials, etc. [See, March, 1995, *PLN*] First elected to the state house in 1980, Padden headed the powerful Law and Justice committee which he used to launch numerous attacks on prisoners and criminal defendants as well as pushing his anti-abortion agenda.

Fortunately, Padden is out of the legislature. On March 28, 1995, Padden was sworn in as a judge on the Spokane County District Court. He replaced his law partner, Raymond Tanksley, who held the judgeship until he died in January. The county commission will choose a legislative replacement for Padden.■

VA Guards Indicted in Beatings

In September of 1993 Charles Coates, a prisoner in the Greenville Correctional Center at Jarratt, VA, was handcuffed and shackled when a prison guard lifted him up and slammed him to the floor face first. Coates says he blacked out and when he awoke another guard was kneeling on his back while the first guard kicked him in the face, neck and ribs.

Douglas Brown, another Greenville prisoner who was also handcuffed and shackled at the time, says that when he saw the guards beating Coates he cursed at them. He was then also beaten while handcuffed, knocked to the floor and sustained head injuries requiring five stitches. Brown suffered neck injuries and required eleven stitches to close a laceration above one eye. Brown says the beatings were racially motivated because he and Coates are white and the officers, who are black, used racial slurs while beating them. *PLN* readers at the Greenville prison have reported that incidents of black guards verbally abusing white prisoners with racial slurs are common events.

Coates and Brown said they have been beaten on numerous other occasions. Brown had one of his front teeth knocked out in October of 1993 when a guard, with a pair of handcuffs wrapped around his knuckles, punched him in the face.

Partly as a result of the September, 1993 incident, attention was focused on a pattern of guard brutality at the Greenville prison, which opened in 1990. State investigators turned over evidence of 32 beating incidents at Greenville dating back to January of 1993 to the Greenville county prosecutor's office. Some of the incidents involve instances where guards have employed "goon squads" of prisoners to inflict beatings on other prisoners.

In October of 1994 Greenville guards Alphonso Smith, Larry Bynum, and Sgt. Benjamin Williams were indicted in connection with the September 1993 beatings of Coates and Brown. Another guard, Dennis Price, was charged with one count of malicious wounding stemming from an incident where he threw scalding water on a prisoner, resulting in third-degree burns on the prisoner's face, chest and stomach. The four guards were suspended without pay. Price later pleaded no contest and received a sentence of six months in jail,

VA Guards (cont.)

all but 30 days suspended. His employment was terminated.

In December of 1994, nine other Greenville guards and four prisoners were indicted on a total of 19 charges, including malicious wounding, conspiracy to commit malicious wounding and attempting to intimidate a witness. The prisoners were indicted on charges stemming from allegations that they participated in "goon squad" attacks on other prisoners at the direction of Greenville guards. The guards were all suspended without pay.

In February of 1995, Greenville county prosecutor, Neely Owen, dropped the charges against Sgt. Williams, involved in the September 1993 beating of Coates and Brown. Owen said that Sgt. Williams must "fully cooperate" in the prosecution of the other guards or face being re-indicted. Charges against two other guards were dropped in January, 1995. The remaining cases are scheduled for trial later this year.

Despite the fact that Virginia prison guards are under indictment for malicious wounding, VA DOC Director, Ron Angelone, is proposing to arm guards within prison security perimeters. Only two states, California and Nevada, currently allow prison guards within the security perimeter to carry firearms. Angelone instituted the policy while he was the director of the Nevada DOC. The Nevada DOC has been challenged for its "shoot to wound" policy, shooting at prisoners for infractions as minimal as "stepping out of line" on the way to the dining room. (See: *PLN*, Vol.5, No.7, July 1994). The California Dept of Corrections is currently under investigation by the FBI for its shooting policy. (See: *PLN*, Vol.6, No. 3 and Vol.6, No. 4, March and April 1995). ■

Sources: *Richmond Times-Dispatch* and letters from VA prisoners.

VA Jails Sue State Prisons

On 30 January 1995, the sheriffs of Arlington, Alexandria and Richmond filed a lawsuit to force the state to remove its prisoners from their jails. The suit was filed in circuit court in Richmond. It says the Virginia DOC is violating a state law that says people convicted of felonies and sentenced to at least three years not be kept in jails for longer than 60 days.

Spokespersons from the DOC and the attorney general's office declined to comment on the suit. Similar suits have also been filed in other counties, including Virginia Beach, Portsmouth and Hampton.

Arlington sheriff Thomas Faust said the suit was not filed to make a political statement. But then went on to say, "The legislators need to be aware now, particularly with the abolition of parole, that they have to give us the means to handle it [jail overcrowding]."

The court action was filed as the VA General Assembly considered several new "get tough on crime" bills in their 1995 session. In 1994 the VA legislature passed a law that abolishes parole. [See: *PLN*, Vol. 5 No. 12] The law, which took effect January 1, 1995, increases sentences by 100% for violent first-time offenders and 300% - 700% for repeat offenders. Those convicted under the new law will serve a minimum of 85% of their sentences.

Statewide, the number of convicted prisoners held in local jails who should have been already transferred to state prisons increased from about 1,780 to more than 2,300 between Sept. 22 and Dec. 1, and the increases will continue. Sheriff Faust complains that the VA DOC reimburses the county \$14 per inmate/day for jailing state prisoners, while it costs the county about \$70 per day to house each one.

Despite what Faust says, it's apparent that the suit sends a clear political message: "If politicians in the state house want to pass more 'get tough' laws... they'll have to start finding ways to pay for them without passing the costs on to the counties." The counties are not willing to bear the cost of the burgeoning prison population growth that results from opportunistic, irresponsible legislation. ■

DOJ Issues Guidelines for Seizing and Searching Computers

The Department of Justice has issued its guidelines concerning the search and seizure of computers and related equipment and information. The guidelines were compiled by attorneys, technical experts and agents from nearly a dozen law enforcement agencies and address a wide range of issues related to computers, from basic definitions of computer equipment to sample search warrant

applications. The stated reason for producing the guidelines is to provide systematic guidance to federal law enforcement agencies and US attorneys.

The guidelines were issued in July, 1994, and have been circulated since then within the federal law enforcement community. They were obtained via the Freedom of Information Act by the Electronic Privacy Information Center of Washington DC. Anyone who owns a computer and is politically active should be aware of the guidelines because they give an insight into the investigative means used to seize computers. We aren't going to discuss the guidelines in detail because they affect such a limited number of our readers, but we think it important that people know the guidelines are available.

Recognizing the sophistication of some computer users, the guidelines suggest obtaining computer experts before computers or data are seized. It states that informants, mail covers and other techniques should be used, before the items are seized, to determine the experts needed. It gives the legal guidelines applicable to searches and search warrants. Including an extensive discussion of consent searches and who can give consent, i.e. spouses, parents, employers, network system administrators, etc. It then goes into the specifics of seizing information, going after networks and bulletin boards, etc. For a copy of the guidelines contact the Bureau of National Affairs at 1-800-255-8131, 1231 25th St. NW, Washington D.C. 20037 and ask for *The Federal Guidelines for Searching and Seizing Computers*. ■

AZ DOC Takes Weights

In December, 1994, the Arizona DOC completed its project of removing all weight lifting equipment from its prison system. The weight equipment was donated by the DOC to various schools and non profit organizations with athletic programs. This is part of the long running campaign by Arizona DOC Director Sam Lewis to strip Arizona prisoners of as many privileges and rights as possible. The "reason" cited by Lewis in the weights removal was claiming that \$600,000 was spent in medical care treating weight lifting injuries among prisoners. Given the fact that Arizona spent \$31 million on prison health care, which was

recently found constitutionally inadequate with horrific conditions detailed by a federal judge [see *PLN*, Vol. 5, No. 8] this seems unlikely.

Arizona prisoners have filed suit in federal court claiming that the DOC lacked the legal authority to give away their weights because the weights were all bought with funds from the prisoners' welfare fund and not state funds. They also claim that the seizure violated their right to due process of law because no hearing or prior notification was given before the weights were taken. We will report any victory for prisoners on this issue. ■

Winds of Unrest Blowing Over Arizona

by Rainman

In the August 1994 issue of *PLN* it was reported that many oppressive policies were being instituted in the Arizona prison system ("Oppression on the Rise in Arizona"). These changes, for the most part, are nothing more than a return to the tried and failed barbaric practices of the past in which prisoners were stripped of all personal possessions, treated harshly and unfairly, and were subjected to conditions that most courts found to constitute cruel and unusual punishment. Arizona has forgotten the mass riots and destruction that erupted in prisons nationwide during the 1970's and 1980's. Instead they have taken our fans, taken away all of the weights, restricted commissary to mere candy items, now charge \$3.00 for any medical visit, banned personal clothing, banned tape recorders and CD players, no longer allow representation in disciplinary cases, instituted the "no parole laws" and brought about dramatic changes as reported in the February 1995 issue of *PLN* ("AZ Passes Repressive Prison Laws"). We will also be charged \$3.00 a month for electricity! Whether the money is earned or sent in, it will automatically be deducted from each prisoner's account. If the prisoner is indigent, their "electricity bill" will be charged to the Inmate Activities and Recreation Fund!

In the August 1994 article it stated, "Sooner or later it [the effect of oppressive policies on prisoners] will seek expression such as the massive riots of the late 1960's and early 1970's; a fact that Symington [Governor] and Lewis [Di-

rector of ADOC] obviously lack the experience to understand." Sooner or later has arrived.

In February, 1995, the prisoners at the Florence South Unit had a full sit-down refuse to work strike in response to the dictatorship rule of the new deputy warden, Angelo Daniel's, oppressive and unfair practices. Mike Arra, DOC spokesperson and prevaricator [these days prevaricator is better known as "spin doctor"] stated the disturbance would not be tolerated and that "the inmates had better learn who is running things." Mr. Arra should learn what it's like to live under such barbaric conditions.

Following the sit-down strike in Florence, prisoners at the Winslow Kaibab facility staged an uprising that resulted in injuries to three prisoners and one prison guard. About 75 prisoners barricaded themselves inside the kitchen after a tactical team fired tear gas and assaulted them with "stingball" grenades, devices that shoot out hard rubber pellets designed to inflict pain. After barricading themselves, the prisoners set fires. The siege lasted approximately six hours. It was evident from the quick use of excessive force by prison guards that they enjoy these kinds of incidents. Many were heard bragging in the following days about how they had inflicted pain and injury on the prisoners. That is precisely the type of attitude that has been instilled in staff by Director Sam Lewis, and is condoned by Governor Fife Symington. What neither realize is that the word is spreading of these abuses, and prisoners are likely to respond in kind with the same level of brutality and callous disregard that is being shown to them. When justice removes its garb of civility and dons the gloves of brutality, those who are brutalized feel justified to defend themselves by any means necessary.

In March 1995, yet another prisoner uprising erupted. At the Safford Graham Unit prisoners used rocks and sticks to assault guards and set fires to several living areas and administrative offices. For over five hours the prisoners had free run of the facility. Several shotgun blasts were fired into crowds with no regard to who was in the line of fire or if they were taking part in the melee. Several guards and numerous prisoners sustained injuries during this uprising. ADOC officials said the matter was "a racial incident between Hispanics and Blacks." However, the root cause is the level of tension

caused by the restrictive policies that have been implemented over the past year. Everyone is becoming increasingly fed-up and disgusted.

The complaints of some prison administrators to Director Lewis and the efforts of outside prisoner family organizations like Middle Ground have fallen on deaf ears. The cry that called out from Attica prison in 1972 moments before many staff and prisoners were killed in the deadly riot is echoing again as the lessons of the past are ignored by DOC officials. Men and women cannot and will not be treated like animals. It is a sad commentary on the American injustice system that the pompous, elite rulers do not listen to the voices that can no longer tolerate such abuses. The tension grows stronger with each coming day, and the echo from the decade of Attica grows louder and louder, "Do You Want to Live Like Dogs, or Die Like Men?" At Attica the answer came in the form of forty-three dead bodies of prison staff and prisoners that filled the prison yard. ■

DOJ Sues MT DOC

On December 1, 1994, the federal Department of Justice (DOJ) sued the Montana Department of Corrections about overcrowding, safety and health problems in the Montana DOC. This lawsuit comes after an earlier suit against the Montana DOC filed by the ACLU was settled by the parties. Timothy Payne of the DOJ's Civil Rights Division stated that the federal government filed suit because it felt there were severe limitations on how the ACLU settlement could be enforced and it was not comprehensive.

The ACLU settlement requires the state to take numerous steps to improve medical, dental and mental health care for prisoners, guarantees prisoners certain amounts of time outside their cells and provide adequate security and training for staff. [See March, 1995 *PLN*] The state was given one year to comply with the agreement which was signed November 29, 1994. The ACLU suit arose from a 1992 riot that left five prisoners dead and the maximum security building of the prison severely damaged.

The federal suit, which names the state's governor, DOC Director and warden Mike Mahoney claims that Montana prisoners are being denied their federal constitutional rights. It alleges that the Montana State Prison is overcrowded,

DOJ Sues DOC (cont)

unsafe and fails to provide adequate medical, dental mental health and emergency care to prisoners. The complaint cites insufficient staff, training, policies and equipment. It also states that there are insufficient protective custody measures.

The Montana ACLU director, Scott Crichton, claimed to be surprised at the federal suit because the DOJ could have intervened in the ACLU lawsuit but chose not to. He welcomed the DOJ suit if it would hasten change on issues left unresolved by the ACLU suit. ■

Grand Jury Slams FL Prison, Again

By Paul Wright

Glades Correctional Institute (GCI) is a medium security prison located near West Palm Beach in Florida. GCI is no stranger to controversy. In *PLN*, Vol. 5, No. 9, we reported audits showing that GCI officials were paying \$5.42 a tube for Pepsodent toothpaste for Muslim prisoners. The toothpaste still had price tags showing it retailed for 97 cents a tube. In a fourteen month period GCI officials claim to have spent \$8,453 on toothpaste for roughly 100 Muslim prisoners at GCI. The March 15, 1994 report by the state inspector general concluded that the high cost was due to the fact that GCI's purchasing manager was a personal friend of the president of C&C Industrial Supply, the Belle Glade company that sold the toothpaste. Even after this finding, the manager was never disciplined.

In *Turner v. LaMarca*, 995 F.2d 1526 (11th Cir.1993) a federal court found that prisoners were routinely raped and brutalized with the full knowledge and acquiescence of prison staff during the 1970's and 1980's. More recently GCI made headlines when six Cuban prisoners convicted of murder escaped from the prison on January 2, 1995, by tunneling out from under the chapel. One of the prisoners remains at large as we go to press, one was killed by police and the other four have been recaptured. As a result of the escape a state grand jury in West Palm Beach has issued a damning report based on its investigation. It also charged the prison's inspector with one felony and six misdemeanors.

In its report the grand jury stated "We are absolutely outraged that the legislature of our state would allow this kind of facility to operate in our community. Building prison beds alone is not the answer!" The grand jury found GCI security to be "severely inadequate" and said the prison was "grossly over-populated and ripe for a riot."

GCI prison inspector Paul Wellborn was indicted on one felony count of witness tampering and six counts, one for each escapee, of negligence. Wellborn turned himself in to police and was released on \$3,000 bail pending trial. As prison inspector Wellborn's job consisted of investigating prison employees accused of misconduct. He reported directly to the superintendent and had been at his job less than a year when the escape occurred. GCI chaplain Dorris Miller told Wellborn on December 20, 1994, that an informant had told her that several prisoners were going under the chapel and spending a lot of time there. Wellborn told Miller he would "take care of it" and that the prisoners were probably making wine. A secretary overheard the conversation and confirmed it. Both the secretary and Miller passed lie detector tests. On January 10, 1995, the indictment alleges, Wellborn went to Miller's home and attempted to intimidate her into changing her account. Wellborn took a lie detector test and the results were "questionable" according to the Florida Department of Law Enforcement (FDLE). Wellborn was placed on administrative leave after being indicted.

The grand jury relied on an FDLE report which found widespread incompetence and corruption at GCI, including drug sales and prostitution, according to assistant state attorney Joe Marks and FDLE inspector John Doughtie. The prison's problems also include overcrowding and failing security equipment. The FDLE stated that no GCI staff member was found to have been involved in any criminal activity that contributed to the escape. This was despite FDLE investigators stating that the escapees had bought two flashlights from a guard for \$15 which they used in their tunneling. Escapee Hector Rivas told the FDLE that they had bought wire-cutters used in the escape from a guard he would not identify.

Marks characterized GCI as a "dumping ground" for incompetent DOC staff. GCI warden Gerald Abdul Wasi was transferred there in November, 1993, in

the aftermath of an escape by three prisoners at Polk Correctional Institution. Marks noted that 77 GCI employees have criminal arrest records. The grand jury reported "A number of correctional officers cannot read or write." The grand jury made numerous recommendations in its March 10, 1995 report, none of which are binding on the DOC. The DOC in turn blamed the legislature for a lack of funding for repair and maintenance and low staffing levels.

As Yogi Berra would say, this is *deja vu* all over again. On July 16, 1981, then GCI warden Turner (the defendant in the above cited federal case) wrote a letter to his superiors in Tallahassee which described the prevailing atmosphere at GCI: "On almost a daily basis I feel that our security staff is simply being tolerated by an inmate population rather than being in control of the operation of the prison." According to the district court in that same case, GCI prison officials made "little or no effort... to control illicit activity at GCI." Prisoners carried knives and openly used drugs. The appeals court in that case noted: "The contraband problem was compounded by staff corruption, as prison officials contributed to, and apparently profited from, the contraband, and utilized prisoners to 'control' and punish other prisoners."

As a result of those conditions, a jury ruled in favor of the prisoners (later reversed on appeal) which led to the highest damages award against prison officials in Florida history (readers should note that on the remand from the eleventh circuit the plaintiffs in *LaMarca* lost their case at trial, thus they actually received no damages despite the earlier award), an earlier Palm Beach County Grand Jury issued an equally scathing report. That grand jury report which the *LaMarca* plaintiffs used, recommended change at GCI in light of "accusations of drugs, alcohol and other contraband, gambling, theft, confiscation, and payoffs among inmates and personnel of GCI." Apparently nothing was done about that grand jury report. It appears quite likely that after making concerned noises, the Florida DOC will ignore this grand jury report yet again. While the *Palm Beach Post* article did a good job detailing the current grand jury report, it made no mention of the historical background of scandal, corruption and mismanagement at GCI. ■

Source: *Palm Beach Post*,
March 11, 1995 and *PLN*

Prison TV: Aid And Comfort To The Enemy

by Adrian Lomax

I've been serving time in Wisconsin prisons since 1980. A lot of changes in the way these joints are run have come down the pike in that time, almost all of them for the worse: less recreation, less visiting, less educational and counselling opportunities, more overcrowding, more lock down time in the cells, and lower wages for prison jobs. Last October the Wisconsin DOC removed all weight lifting equipment from state prisons. In 1992, prison officials here imposed a draconian new scheme of property rules that drastically reduced what prisoners could have. Everything that inmates own, aside from their televisions, must now fit inside a footlocker measuring 16" x 16" x 32".

TVs are not only excepted from the 1992 property rules, they are excepted from the entire trend toward less and less. Wisconsin prison officials have steadily expanded opportunities for television viewing. The Waupun prison now shows five uncut movies daily on its closed-circuit institution channel, and the Portage prison offers prisoners basic cable service, ESPN and all. The Green Bay prison, where I'm now confined, provides state-owned TVs, at no charge, for prisoners who can't afford to buy their own sets.

It's no coincidence that TV privileges have grown during the same period when everything else has been cut back. Prison officials gave us more and more TV precisely for the purpose of keeping inmates pacified while the DOC took everything else. In essence, prisoners have sold their souls for television. We've said to the keep: "Look, you all can do anything you want to us so long as you let us watch TV."

An instructive example of this phenomenon took place in 1993 at the Clinton Main Facility in New York. Prisoners there requested that they be allowed to have in-cell televisions, and administrators had wanted for some time to cut back package-room privileges. So the warden put it to a vote. Prisoners could have their in-cell TVs if they agreed to a rule limiting them to no more than two packages per year from families and friends. The inmates voted to give up their packages in order to get the TVs.

When prisoners and their supporters began campaigning to get televisions into the prisons back in the 1970s, correctional administrators resisted the idea.

But twenty years of observing the effects of television on prisoners has caused the keepers to change their minds. Nowadays, when elected politicians rail against prison TV in order to get votes, prison officials vigorously defend the "need" to keep television in the joint.

The administrators know that television is the most powerful tool they have for keeping convicts docile and submissive. TV privileges are suspended as punishment for infractions, and television is completely denied to convicts in the hole. Prisoners who spend most of their waking hours staring at the tube, as an embarrassingly large number do, pose no threat to the keep. A definite trend I've noticed over the course of my term is that the level of resistance to oppressive actions by prison staff has decreased in direct proportion to the increase in television privileges.

Whenever I pull a stretch in the hole, I'm struck by the huge difference in the extent of social interaction between prisoners in the seg units and those on the main-line. Convicts in seg talk for hours on end, discussing everything imaginable. In the hole I'll often read interesting articles aloud on the tier, and spirited debate always follows. Prisoners from all different sets and races contribute their views and respond to others. Nothing approaching that level of community can be found in the mainline cellblocks, where prisoners mostly interact with their TVs.

Reading material is like gold in the seg units. All books and magazines that make it into the hole are eagerly devoured and passed from prisoner to prisoner. I've seen convicts perform astonishing feats of fishing, skipping lines from tier to tier and even around corners in order to retrieve printed matter. I've also spent several years working in prison libraries. I can't begin to count the number of times I've seen a mainline prisoner show up in the library, grab a newspaper, turn to the TV listings, write down the times and channels for all the shows and then leave, never to be seen in the library again.

There is yet another way the presence of television in the joint harms prisoners. The general public firmly believes that anyone who watches TV is living in the lap of luxury, even if they're also packed like sardines into filth-ridden, vermin-infested cells, fed slop, enslaved and forced

to work for pennies an hour, deprived of family and friends, and denied all freedom. That belief is incomprehensible to me, but it's very real and extremely popular out there in the world. The fact that we watch cable TV and rented videos sets people's blood boiling, no matter how badly we're treated otherwise. Right-wing cranks continuously scream that the justice system is way too soft on criminals, citing as evidence the fact that prisoners are sitting around watching color TV. Many people are even moved to support capital punishment because they so loath the notion of convicted murderers watching TV in prison.

The presence of television carves away at our interests from opposite directions at the same time. TVs allow correctional administrators to roll back our rights and impose conditions harsher than they would otherwise be able to get away with, and prison TV also convinces the public that we're living far too comfortably in these joints. A more devastating double-whammy is hard to imagine. Those whose goals are hostile to the cause of prisoners have no more potent a weapon in their arsenal than prison TV.

Just as the prison-administration establishment changed its view on TV, prisoners and their supporters must do the same. It's time for us to recognize the real purposes prison TV serves. Nothing gives more aid and comfort to our enemies.

Paul Wright, in an essay in these pages supporting TV, said the prisoner rights movement can be characterized as the struggle for more: more visiting, more education, more access to the courts, etc. I accept that characterization, but the most effective step we can take toward accomplishing our ends is to dump the TVs. It is only because we have television that prison officials have been able to get away with taking everything else. So long as our adversaries can tell the public that we're sitting around watching cable, no grievance we have, regardless how just, will get a fair hearing in the public discourse. Let us bar the gate to this Trojan horse our enemies so deviously offer. Give television back to the keepers; let them watch it. ■

[Editor's Note: The September, 1994, issue of PLN had an article by Paul Wright on Prison TV. Copies of that issue are available for \$1, the article alone is available for an SASE]

Just Say "No" ?

by Philip McLaughlin,

*[Editor's Note: We are reprinting the following article because we think our readers will be interested in knowing about the forced drugging of prisoners. The legal background for this is that in 1989 the Washington state supreme court decided *Washington v. Harper* which held that before prisoners could be drugged they had to be found incompetent by a court and the drugging had to be necessary for medical reasons. The state appealed and in 1990 the U.S. Supreme Court held that it does not violate due process to forcibly drug prisoners, even those who have never been found incompetent and are not mentally ill, as long as prison doctors claim it is necessary. They did this while acknowledging the severe and permanent damage that powerful psychotropic drugs inflict. Since then, PLN has reported numerous cases which have upheld prison officials, ability to forcibly and indefinitely drug prisoners.]*

Here we live in the time of the Hmighty War on Drugs, with D.A.R.E. programs and "Just Say No" slogans everywhere we look. Drug use has probably never been frowned upon more by the mass media and the Establishment and, consequently the public. But how many people are aware of the practice of administering mind-altering drugs against a person's will by our prisons and mental institutions today? We are talking about psychotropic drugs prescribed by state employed psychiatrists. These drugs are supposedly for the use of "helping" prisoners and patients with a variety of mental ailments from minor depression to schizophrenia.

I first became aware of the practice of forcing drugs on prisoners when I came to the Special Offenders Center in Monroe, Washington. I was transferred from an Intensive Management Unit at Washington Corrections Center in Shelton where I had been housed for several months. They suspected I was suffering from a severe depression, so they sent me to S.O.C. for an evaluation period of 3-4 months. As of this writing, I have been at S.O.C. over three months, and will soon be leaving since my depression "miraculously" disappeared once I was taken out of the "hole" at Shelton where conditions were, and remain, inhumane and — not surprisingly, *depressing!*

While at S.O.C. I have witnessed a nightmarish process in which various prisoners have been forced to take drugs. Many of these psychotropic drugs cause mild to severe side effects. Common side effects include, but are not limited to, muscle spasms, restricted or delayed movement, blurred vision, nausea, extreme thirst and "cotton mouth," memory loss, extreme fatigue, loss of concentration, and slowed thought processes. In rare instances death has occurred as a result of taking new and dangerous drugs because either the testing on these experimental drugs was not thorough enough to discover possible serious side effects, or the side-effect medication supposed to accompany the drug was either not administered, administered too late, or administered in too low of a dosage.

The process of placing a prisoner on involuntary medication status involves the recommendation of the prisoner's assigned counselor and then an involuntary medication hearing. The hearing is a mere formality, a kangaroo court composed of a panel of biased state-employed staff and doctors, including two psychologists, one psychiatrist, one hearing officer and the prisoner's assigned counselor. The counselor states his/ her case to the doctors. The prisoner is allowed to make a statement. The hearing officer operates the tape recorder, and is responsible for ensuring that the hearing is conducted properly. Two of the doctors must vote in favor of the involuntary medication status, and one of the doctors must be the psychiatrist. Once enacted, the involuntary medication status is reviewed once every six months by the same panel. The determining factors the doctors are supposed to go by are whether or not the prisoner presents a "serious threat to the safety of himself, others or property" when not on medication.

And what actions by an prisoner are commonly defined as being serious safety threats? Unpredictable violent episodes? Breaking windows, assaults? Perhaps in some cases these reasons are used, but the instances I have witnessed here were much less serious.

One prisoner by the name of Mike threatened to punch a guard during a heated argument. He never did so and has no history of assaultive behavior, but was placed on involuntary medication status nonetheless. Now, as a result of the drugs, he looks and acts like a zombie; his thought process is much slower and he

has stiff muscles that curl his wrists back so that when he walks he has the swinging arm motions of an ape.

Another man by the name of Bill was recently placed on involuntary medication status because he informed the superintendent that his "psychic employers" would have him taken care of if he was not released from S.O.C. immediately. Bill believes he is a psychic general employed by a secret psychic forces agency in D.C. under supervision of the President himself. He repeatedly informs the counselor and officers that the President has ordered his immediate release, and that he is currently being kept at S.O.C. illegally. Okay, so he's not quite right in the head, but the supposed "threat" was no more than the delusional rumblings of a harmless old man.

Another prisoner, Pat, was placed on involuntary medication status because he ripped up some of his generic state-issued clothing. For this act he was considered to be "a serious threat to property." And the list goes on.

Obviously, the above-mentioned examples are not reason enough to force a man or woman to ingest mind altering drugs against their will. But in my opinion, even if these prisoners were actually assaultive or whatever worst-case-scenarios one can come up with, it still would not justify playing God with another human being and forcing that person to take mind-altering drugs into their body. This is a basic human right that should never be violated for any reason. If some one is assaultive, then isolate them from others, if absolutely necessary. If one is suicidal, then watch that person closely. If someone is a threat to property, then limit that person's access to damageable property. But never should any man have a right to force another man or woman to ingest mind-altering drugs against their will. Never!

And what happens to those prisoners who exercise their choice to "Just Say No?" If a person on involuntary medication status refuses to take his prescribed drugs, he will be forced to do so by the "goon squad." A group of five or six guards gear themselves up in black jump suits, combat boots, helmets, shields, and gas masks. They then proceed to the prisoner's cell. If the prisoner refuses to cuff-up so a shot can be administered to him, then the goon squad sprays him with a powerful gas that, on contact with skin, literally gives the sensation of being on

fire. It also burns the lungs and blinds. They spray again and again until the prisoner complies or passes out. They then hold the prisoner down while a nurse administers a shot with a hypodermic needle in the prisoner's behind. All this is done in the name of "mental heath," part of a supposed "benevolent" effort to help people with mental illnesses, when what it really is, is a legal way to exert total control over people through the use of drugs. And who's to stop them? If prisoners have very little support or sympathy from the public, or defenders of any kind, then mentally ill prisoners and patients, most of whom have no concerned family or friends to help from the outside — have even less.

Imagine if you will, a syringe in my hand. I am coming toward you. I have six men in riot gear, armed with gas canister and handcuffs to back me up. You will take my mind-altering drugs or you will suffer! I do not care if you don't understand what it is you're taking. I don't care if they muddle your brain, tranquilize or zombify you. I don't care about your fears or the painful side effects. I have no moral problems with invading your body with mind-altering drugs. You will take these drugs now or we will attack!

You have a question? Hmm. No, I'm sorry — you cannot "Just Say No."■

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Attention Prisoners Convicted of Drug Offenses!

The *PLN* has often stated that in terms of political power prisoners don't have a voice that anyone in power has to listen to. A *PLN* reader in USP Lewisburg disagrees and submitted the following.

Inform everyone you know (your spouse, children, family members, friends) to telephone both of their Senators and members of the House of Representatives *once per month* and deliver the message: "Decriminalize drugs and stop wasting my taxes incarcerating drug offenders."

Inform everyone you know that they dial (202) 224-3121 in order to speak with both their Senators and member of the House of Representatives. If anyone does not know the names of their two Senators and House member, they need only tele-

phone their nearest Post Office and ask for that information.

Remind everyone to telephone *once per month* until the repressive drug laws are changed. Talk to other prisoners and get them involved, too. The more people that are phoning in the message to their two Senators and Congressional Representative *every month* the sooner the laws will get changed and the sooner you may get out of prison.

In 1992 there were one million people arrested for drug offenses, at a cost of \$40 billion. 340,000 of those arrests were for marijuana offenses. Currently there are over 250,000 drug offenders in state and federal prisons. Approximately 65 percent of federal prisoners are imprisoned as a result of drug laws.

If all of those imprisoned for drug offenses got their family and friends to call their Senators and Congressional Representative every month... well now, that just might be a voice that would have to be heard.■

Grievance Policy Modified

In response to recent legislation the Justice Department has issued an interim rule that modifies regulations relating to state prisoner grievance procedures, encoded in Part 40 of 28 CFR. Under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(e), a prisoner who has filed a civil rights action in federal court may be forced to exhaust local administrative grievance procedures if those procedures have been certified by the U.S. attorney general as being in substantial compliance with minimum standards or found by a court to be so. The interim rule makes two kinds of amendments to existing regulations to reflect changes made by the 1994 federal crime bill. [*PLN*, Dec. 1994]. First, it increases the time period for which the federal court may continue the § 1983 case from 90 to 180 days. Second, it now provides that exhaustion may be required if the attorney general certifies, or the court determines, that the administrative grievance procedure is "otherwise fair and effective" even though it does not comply with the minimum standards promulgated by the attorney general. The interim rule, upon which the Dept. Of Justice requests comments, was published at 60 Fed. Reg. 13902 (3/15/95).■

Reported at 57 CrL 1043, April 12, 1995.

The New Politics of Crime

by Dan Pens

Those who command state power have honed their craft over the ages. The smart ones learn the tricks of their trade by studying the "science" of politics whereby they can benefit from the accumulated knowledge of centuries. One of the tricks that rulers employ is that of creating the bogeyman. The masses need someone or something other than the state at which to vent their anger and frustration when they get restless. Those leaders who fail to employ the technique of creating a bogeyman for the masses often find themselves at the short end of a revolution!

It's important as an aside to understand that those who *command* state power are not one and the same as those who *wield* it. The form of Democracy practiced in this country (and in *all* of the "free" world for that matter) is one in which elected officials *wield* state power but the wealthy and corporate class *commands* it.

America became the rich and powerful country it is through a unique set of circumstances. In the beginning we existed only on the margins of a "new" continent (not "new" to the millions of humans who lived here when Columbus pulled up!). As America grew it had a vast wealth of "unexploited" natural resources to tap. There was the minor problem of Native Americans who often stood in the way of "progress" by laying claim to those resources. But that was nothing a little genocide couldn't fix. Native Americans then served in the role of "bogeyman" for the Nineteenth century.

By the latter part of the century, most Native resistance had effectively been crushed. The rush to sweep across the continent and garner the spoils of conquest was accelerated by technological advances in transportation (the railway) and communication (the telegraph). It was then that business in America could begin in earnest. Though much of this country's wealth was initially created through the exploitation of slave labor, the unrestrained growth of business in the post Civil War era was fueled by an inexhaustible supply of "cheap foreign labor"—immigrants. Those who were once slaves in the literal sense became wage slaves when jobs were available to them at all, that is. The Thirteenth amendment abolished "involuntary servitude" *except*

The Politics of Crime (cont.)

for prisoners. Slavery thrived though slaves had to be arrested and jailed rather than purchased at auction. This combination of cheap labor and vast natural resources then was what fueled America's incredible wealth.

The beginning of this century found unrestrained capitalism in full flower in America but the working class was showing signs malcontent. The ruling class found itself in the awkward position of being the focus of the anger and frustration of the "restless beast" of the working masses. They could no longer deflect attention away from themselves by redirecting it to "the Indian problem." An organized labor movement began to form.

This was truly a time of crisis for the ruling class in America. In response they created a new bogeyman — communism. Just as Native Americans had threatened their interests by laying claim to their land (and its vast richness of "unexploited" natural resources), now communism presented a dire threat to business interests because of its claim that profits from the production of goods and services rightly belong to the workers who create those profits. The propaganda machine of the wealthy class — who by now had ownership of virtually all the major media — began the task of shaping this new bogeyman in the minds of the working class. It was a tough sell. On the face of it, it would seem an impossible task. How do you convince the working masses that a political system based on *their* economic interests was a threat to their freedom? But through decades of unrelenting propaganda against international organized labor movements, political repression of domestic labor, and xenophobic anti-immigration laws, this new bogeyman began to take shape in the minds of masses. By the end of the 1940's the transformation was complete. "International Communism" was a force to be feared and reviled by all. The propaganda was so thoroughly ingrained in American culture that a schoolyard taunt of, "Your mommy is a commie!" might actually result in a bloody lip.

Crime as a political issue was first exploited to good effect by Richard Nixon who used it as a "wedge issue" in the 1968 Presidential elections. John Erlichman wrote that in 1969 when the Nixon administration looked out from the

White House and saw 300,000 anti-war demonstrators, they felt like the Revolution was imminent. The state responded by stepping up domestic counter-insurgency operations. Using "crime" as its excuse, the Nixon administration stepped up repression (even while being investigated for "crimes" of their own.) Nixon's success at the polls helped to propel the crime issue to use as a political propaganda tool in every campaign since, usually a thinly veiled form of racism.

With the fall of the iron curtain and the Soviet collapse, the effectiveness of communism as a state bogeyman also began to decline. That's when "crime" stepped to the forefront. If the ruling class media and state bureaucracy were able to convince the restless masses that communism was a threat to working people, why not now convince them that their interests are threatened by *poor people*? Again, on the face, it seems like a ludicrous proposition.

The Congressional Budget Office disclosed in 1992 that a staggering 77 percent of the before tax income growth of U.S. families between 1977-89 went to the top one percent. In the years 1977-92, after-tax income of the bottom 80 percent of the population (adjusted for inflation) fell 2.2 percent, after-tax income of the top 1/5th, rose 28.1 percent, and the after-tax income of the top 1 percent soared 102.2 percent! How is it possible then, to convince the restless masses that the new bogeyman on the block is the "*poor*"? Crime! Put the fear of crime into them. Splash crime on the front page of every newspaper. Make it the lead in every news broadcast. Make sure that most of the images of "criminals" are minorities, and you propel the myth faster, by riding the undercurrent of racism that still runs strong in America. Portray poor people as filthy, drunken, violent brutes on television shows like *Cops*, and the restless masses are more inclined to view poor people with fear and revulsion. Feed the masses an unrelenting diet of crime, crime, crime, and they'll soon see who the new bogeyman is.

The propaganda machine of the American corporate class has become more sophisticated since it took on the task of creating the commie bogeyman ninety years ago. It took nearly fifty years to put the fear of communism into every American heart. It has taken less than two decades to instill an irrational fear of "Crime" into the American masses. And now poor people, women and children,

immigrants (making a return appearance) and prisoners are the targets of anger and frustration.

Prisoners make an especially easy target for attracting the fear and loathing of the American public. Prisoners have no economic or political power whatsoever. There is little social stigma to stand in the way of openly reviling prisoners. They make the perfect scapegoat. As such, the new politics of post-Soviet bogeymanism have struck prisoners particularly hard. Here is a synopsis of various anti-crime voter initiatives passed in 1994 that effect prisoners.

California passed Prop 184—the Three Strikes Initiative—by a 71.9 percent to 28.1 percent margin. A California citizen convicted of *any* felony who has one prior "violent" conviction will serve a sentence twice as long as otherwise mandated by law, and will be sentenced to state prison. A Court cannot grant that person probation or place them in an alternative program such as drug treatment. Any who are convicted of *any* felony and who have at least two prior "violent" convictions will serve a state prison sentence of three times the normal or 25 years, whichever is greater—and at the court's discretion, they may be sentenced to life.

Georgia passed a "two strikes" law which will impose a life without parole sentence for conviction of a second violent crime. A similar law was passed by the Georgia legislature a year before, but was struck down as unconstitutional because the state constitution gave the Board of Pardons and Paroles exclusive authority in such matters. A constitutional amendment to allow implementation of "two strikes" was approved by 81 percent of the voters.

Maryland passed a new constitutional amendment with approval from 92 percent of the voters that allows crime victims to make a statement in court about how the crime has affected his or her life. In the past, judges could allow such statements at their discretion.

Michigan voters approved a constitutional amendment limiting criminal appeals. The measure prohibits a criminal defendant who pleads guilty or no contest from appealing a conviction without the express permission of the trial court. This is kind of like requiring plane crash victims to obtain the permission of the airline before they can sue! The amendment passed by a 73.5 percent to 26.4 percent margin.

Oregon adopted three anti-crime voter initiatives by wide margins. All state prisoners are now required by law to work full-time jobs under measure 17, which passed 71 percent to 29 percent. Measure 11 prescribes stiffer mandatory sentences for specific felonies. It passed 65 percent to 35 percent. And under measure 10, a 2/3rd's vote in each house is necessary for the state Legislature to reduce voter-approved criminal sentences. It passed 65 percent to 35 percent.

Vermont voters overwhelmingly approved a new constitutional amendment that gives judges the authority to deny bail to any arrestee if the "evidence of guilt is great" or if the person poses a threat to society.

This is a summary of voter initiatives. The actions of various state legislatures will be summarized in a future *PLN* article. It is plain to see, though, that American politics has emerged from the Cold War era and has embarked on a new war against the poor. When will working Americans wake up from the nightmare of inequality and economic oppression and look under their beds to see there really is no "bogeyman" there? When will the Second American Revolution begin, and what shape will it take?■

News in Brief

WA: Bob Conklin, the former chief of Corrections for Chelan county was sentenced to five years in prison after being convicted of four counts of third degree child molestation and one count of indecent liberties. The former FBI agent, King County prosecutor and special forces soldier was convicted of performing "medical examinations" of the genitals and rectums of young boys. Conklin has no medical training and admitted to performing some 70 such "examinations" over the past 20 years.

MA: Several years ago DOC dog handlers requested, and received, permission to keep their DOC trained dogs at home. Three years later they sought that the DOC pay them for "overtime" for having fed, groomed and cared for the dogs. Already paid \$17 an hour the guards seek an average three to four hours overtime a day for the past three years. They also want to be paid for the time they spent driving the dogs to work. The DOC refused to pay them overtime and they filed suit in federal court. If they win the guards will soak tax payers for some \$1.4 million dollars, plus attorney fees.

CA: Pelican Bay State prison, the notorious maximum security prison, was built in Trinity County at the urging of "liberal" former state senator Barry Keene and Assemblyman Hauser. Responding to complaints from rural cops that Pelican Bay prisoners released from the prison and suddenly thrust back into real life after years of cruelty and deprivation in the modern torture chamber "have made for some thrilling Greyhound rides for unsuspecting passengers when they boarded the southbound bus in Crescent City" Hauser has introduced legislation requiring that all prisoners released from Pelican Bay be transported back to the county of commitment by the DOC in armored vehicles.

WA: In early March, 1995, the Yakima County jail announced that it was going to remove all televisions from the jails prisoner housing units. Jail officials claim the measure was designed to cut costs because it supposedly costs about \$10,000 a year to repair, replace and operate 30 TVs in the jail.

FL: Two prison guard brothers, Tim and Joseph Register, were target shooting outside their mother's home when Tim emptied his gun and began to playfully dry-fire his pistol at Joseph. Joseph returned his brother's fire, supposedly thinking his gun was empty. Joseph's pistol fired and instantly killed Tim. Tim was employed at Gulf Correctional Inst. and Joseph was employed at Waiton Correctional Institution.

MI: On December 26, 1994, Vitomar Hinic was shot and killed by guards at the Adrian Correctional Facility while scaling a fence and refusing orders to climb down. On January 20, 1995, Robert Rose was shot while scaling a fence at the State prison in Jackson.

Dominican Republic: Hundreds of prisoners rebelled and seized La Victoria national prison on April 10, 1995, to demand better prison conditions. One prisoner was killed and 19 injured. The prisoners complained of overcrowding and frequent beatings. The prison was built to house 500 prisoners and currently holds over 4,500. The prisoners demanded closure of the prison's dining hall and permission to receive food sent by relatives.

IL: On February 4, 1995, more than 24 guards and prisoners at the Cook County (Chicago) jail were injured during a protest against bad conditions in the maximum security section of the jail. Prisoners used homemade knives, water bottles in

socks and slicked down the floors with soap in the struggle against guards. The protest began when 60 prisoners refused to return to their cells.

CA: Stacey Koon, the former Los Angeles cop who gained notoriety for savagely beating Rodney King and who was subsequently convicted has been imprisoned in a federal prison in Boron, CA. Since being convicted Koon has raised more than \$4.7 million through direct mail fund raising to pay for his legal bills and support his family. Needless to say, the "tough on crime" crowd has been suspiciously silent about Koon beating and begging his way to fame and fortune.

Chile: On April 3, 1995, 72 political prisoners in the recently built maximum security prison began an indefinite hunger strike to protest the discovery of more than 150 hidden microphones inside the prison. Their strike was also being supported by hunger-striking relatives outside the prison. Prison minister Claudio Martinez has sought a court order to force-feed the hunger-striking prisoners. A prisoner's wife said "They found microphones everywhere, including in cells, showers and rooms where prisoners meet their lawyers. Most were hidden in light fittings and plugs." Martinez claimed the microphones were installed but never used. Attorneys for the prisoners have filed suit claiming that the bugging violated the prisoner's right to counsel. This hunger strike is the latest in a series of protests against the harsh control unit prison which houses only leftist political prisoners.

TX: Maurice Andrews, a death row prisoner since 1932, was stabbed and killed by fellow death row prisoners on April 5, 1995. Prior to being killed Andrews had succeeded in obtaining five stays of execution.

VA: Robert Brock, a state prisoner, filed suit for 55 million against himself claiming he had violated his own civil rights by getting arrested. He claimed he drank alcoholic beverages which violated his religious beliefs. He was then arrested and convicted of breaking and entering and grand larceny. His complaint, filed in federal court, stated "I want to pay myself five million dollars, but ask the state to pay it in my behalf because I can't work and am a ward of the state." Judge Rebecca Smith dismissed the suit as frivolous and noted that the claim and relief sought, though creative, were "totally ludicrous." ■

From the Editor

by Paul Wright

Welcome to the 61st issue of *PLN*. As Dan said in last month's editorials we want to expand *PLN* to 24 monthly pages in order to deal with a backlog of material. We have expanded from 10 typed to 20 typeset pages without including any fluff or filler in our content. As the number of prisoners grow along with worsening conditions and attendant struggle there is more news to report on all fronts. Since we started I have always done the blurbs of federal case law. Back in 1990 it was not unusual for some issues of *PLN* not to report any case law at all simply because there was none to report from the advance sheets. Nowadays we try to ensure that about half of each issue of *PLN* is composed of case law (in addition to articles about legal research, suits filed, litigation updates, etc.) and we have a backlog of cases. Likewise, we have a backlog of articles, book reviews, etc.

As soon as we reach 2,000 subscribers we will expand to 24 pages. We have been hit with almost back to back postage and printing cost increases. Earlier in the year we were hoping to cut costs, now we are going to just try and hold them down. Our outreach campaign has been going well. We have been sending sample copies of *PLN* to prisons across the country in addition to public defenders, prison law libraries, etc. We hope that this will help increase our circulation. We have a little more than 1,600 subscribers now. Readers can assist us in this process by encouraging friends, relatives, other prisoners, concerned citizens, etc. to subscribe. We can send subscription flyers on request. We can also send bundles of 25 copies of *PLN* for distribution just send 10 stamps to help offset our postage costs. Any additional donations to support our outreach campaign would be much appreciated.

Observant readers may have noticed that the March 1995, issue contained more typo's than usual. A couple of things happened to cause that. First, that issue was late because our layout person was ill. Dan and I received the draft of the March issue and duly proofed it, picking up most of the typo's, OCR errors, etc., as we normally do. Alas, before we could call in the errors I was bundled off to the slammer and my captors had the draft copy, corrections and all. Rather than delay that issue any longer in order to proof another

copy we decided to run it as it was. These things happen, so accept our apologies for a somewhat rougher than usual issue.

We are planning to limit our coverage of pending anti prisoner legislation for several reasons. Namely, there is such an increase of it nationally that it is hard to keep up with it in anything approximating a timely manner. Due to the changes legislation undergoes it is hard to give accurate reports about it. By the time an article goes to press and that issue is mailed the law has likely undergone several mutations, died, etc. As mentioned above, this type of coverage is competing for scarce space with the other topics we cover. So we plan to report on prison related laws when they are actually enacted into law. We ask readers in other states to keep us posted on this type of legislation by sending us copies of the statutes once they are signed into law. We also like any accompanying articles putting the legislation into perspective.

We are receiving a lot of article submissions which is great. Because of the shortage of space we are obviously not able to print everything we get. We sort through submissions to determine what will be of interest/use to our readership, not everything fits into this category. So don't get discouraged if we don't use your submission. If you want us to confirm receipt of any materials, include a SASE. Enjoy this issue of *PLN* and pass it along to someone else when you're done with it. ■

New Habeas Book Book Review

Habeas Corpus Checklist is the 1995 book by Ira Robbins which gives an exhaustive overview of the law of federal habeas corpus petitions. The book is current through the Supreme Court's 1993-94 term. Useful for both attorneys and pro se litigants the book is divided into sixteen chapters that highlight the relevant case law on each aspect of habeas litigation. This includes chapters explaining the three competing models of federal habeas review, general habeas notes (i.e. no right to counsel), a history of the writ; an overview of its scope; non-retroactivity of habeas petitions; jurisdiction and venue; ex-

haustion of state judicial remedies, mixed petitions; state procedural defaults, evidentiary hearings, appeals; successive petitions and additional references along with sample forms and motions.

The book discusses controlling supreme court doctrine on these issues as well as the law in each circuit. This book will be especially useful for those preparing a habeas petition for the first time. For the experienced habeas litigator it provides a useful checklist, as the title implies, of things to go over before the petition is filed with the court. This is crucial considering the supreme court has limited prisoners to only one writ of habeas corpus, which means it has to raise all the issues the petitioner wants raised the first time. The book is well organized and easy to use, highly recommended. The book is available from: Clark, Boardman, Callaghan, 155 Pfinsten Rd. Deerfield, IL. 60015-4998, Phone (708) 948-7000, and the price is \$89.00. ■

Forfeiture and Double Jeopardy

This new book, of the same title, by attorneys Brenda Grantland, Jeffrey Steinborn and Reba Weiss is subtitled "How to turn prosecutorial overreaching into release of prisoners or return of seized property." The Attorneys are experts in the field of forfeiture law and have argued several prominent cases on this issue. This 103 page book will be invaluable to anyone litigating forfeiture cases, whether pro se or Attorneys.

The book clearly and concisely explains the double jeopardy principles that require prosecutors to either press criminal charges or forfeit property and holds that doing both in separate proceedings is unconstitutional. A history of forfeiture and the legal principles underlying it are clearly and carefully explained. While designed for litigants it is well written and easily understood by non-lawyers. Extensive case law is cited and a handy checklist is included so readers can determine if these principles apply to their case. Copies of key cases are part of the book as well.

Most question likely to arise are covered and answered by the authors. Copies are available for \$40 each. Prisoners and forfeiture victims can purchase copies for only \$20 post paid. The book is published and made available by Forfeiture Endangers American Rights, a national group

dedicated to repealing and combating these oppressive forfeiture laws. For more information or to order copies of the book contact: FEAR, 265 Miller Ave. Mill Valley, CA. 94941 (415)388-8128. The new 2nd Edition is completed, with additional, clarified & expanded information by the winning lawyer of *U.S. v McCaslin*, 863 F Supp 1299 (WD Wash 1994) and now joint defense for *U.S. v. \$405,089.23*, 33 F3d 1210 (9th Cir 1994) by Law Offices of Jeffrey Steinborn, 30th Fl, Smith Tower, Seattle, WA. 98105-2321, (206) 622-5117 ■

True Lies in Philly

Five current or former police officers from the 39th District of North Philadelphia were indicted by a federal grand jury this past February, accused of framing dozens of Philadelphians. The indictment accuses the officers of warrant less searches both inside and outside their district, during which they stole money, drugs and guns, beating handcuffed suspects, falsifying reports and records to hide evidence of their illegal searches and seizures, and maintaining a secret stash of drugs and narcotics paraphernalia which they used to "flake" (falsely accuse) individuals of drug dealing or possession. The attorney for one of the officers, Steven Brown, says his client would quickly sign a plea agreement with federal prosecutors. He says that Brown had acknowledged the wrongdoing and was willing to admit to all of the charges.

One case is illustrative of how Brown and his fellow officers operated. In 1988 Brown went to a judge to obtain a warrant to search Joe's Steak and Hoagie for suspected drugs. In order to establish probable cause he told the judge that while working undercover he observed a teenager sell drugs at a school, and then go to the steak house and hand the money over to the proprietor. He says he then observed the proprietor give the teenager a brown paper bag. Brown said he followed the teenager outside and purchased \$5 worth of marijuana, which the youth produced from the same paper bag. This is a fairly compelling story, an evil drug dealer hiding behind the counter of his sandwich shop while sending underlings out to peddle drugs to school children. The warrant was issued. The only problem is the whole story was fabricated.

Brown and two other officers executed the warrant, found thirteen pounds of marijuana at the sandwich shop, and pocketed \$1,000 of the suspect's money while they were at it. A defense witness at the trial refuted officer Brown's testimony about witnessing the exchange of drugs in the sandwich shop, stating that the clientele at Joe's was "basically 100 percent black," and that he would have remembered seeing Brown, who is of Chinese descent, standing in the sandwich shop. The proprietor of the sandwich shop, Joe Morris, was convicted, imprisoned and was still doing time when the arresting officers were indicted this February.

District Attorney Lynne Abraham asked a judge to dismiss the charges against Morris, who could be freed as soon as a hearing could be held. Abraham said that she filed similar motions to dismiss the charges in eleven other cases handled by the indicted officers. The federal indictment listed 26 other drug searches conducted by the officers from 1988 to 1991, but those did not result in convictions.

In another case two officers apprehended Arthur Colbert Jr., whom they mistakenly took for a drug dealer, dragged him out of his car and drove him to a crack house to interrogate him. While interrogating Colbert one of the officers took some bullets out of his gun, put it to Colbert's head, and played "Russian roulette" with him in an attempt to intimidate him into provide them with incriminating information. They then took Colbert to the 39th District headquarters and placed him in a holding cell for two hours while they conducted a warrant less search of his home. Colbert was released after two hours.

Colbert's complaint about the incident and his persistence in following up on it are said to have blown the lid off of the case. According to reports in the *Philadelphia Inquirer* the investigation is ongoing and could result in charges against as many as 11 additional 39th District officers.

Indicted officer Brown, speaking through his attorney, says the reason he falsified evidence in so many cases was in order to "go along with the flow," presumably implying that perjury and falsifying evidence are standard practice in the Philadelphia police department. It is notable that Mumia Abu Jamal is currently on death row in PA for allegedly killing a Philadelphia police officer. His conviction was based in large part on testimony

and evidence provided by Philadelphia police officers, despite the fact that numerous other witnesses at the scene disputed the police version. Were the officers in Mumia's case just going along with the flow?" ■

Sources: *The Philadelphia Inquirer*, March 5-6, *Law Enforcement News*, March 31.

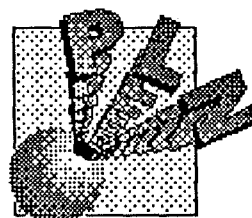
[Editor's Note: In the October '95 issue of PLN we reported on NY State police falsifying evidence. The fact that police and/or prosecutors fabricate evidence and perjure themselves to gain arrests and convictions is probably not "news" to most of our prisoner readers. What makes the above story "newsworthy" is the fact that the practice is brought to light and reported in the corporate mainstream press]

Two Strikes and You're Out - of Prison Space

In past issues of *PLN* we have reported on Georgia's "two-strike" law. Before the November, 1994, elections both Governor Zell "Zig Zag" Miller and Corrections Commissioner Allen Ault assured the GA legislature and voters that the state had enough prison capacity to absorb the increased prisoners that would result from passage of the two-strike law, well into the next century.

A little over three months later (and after "Zig Zag" was reelected) Ault told this year's legislature that the state's prisons will be full in just five months. He said that Georgia would have to build five 7,000 bed prisons per year at a cost of \$26 million each just to keep pace with prison population growth projections. The state is just finishing a \$100 million building program that added 7,000 new beds.

Source: News clipping from a *PLN* reader, without the name of the paper or the date. Please keep those clippings coming, but remember to include the name and date of the publication. ■



The Last Mile

by Johnny "Byrd Dog" Byrd

Sunday, March 13th, 1994, at 12:35 pm., exactly 35 hours and 26 minutes before my scheduled, state-sanctioned murder, the "Death Row Escort Squad" arrived at cell, saying "It's time Byrd Dog," "strip" said one. A number of men stood in front of my cell, nervously watching as I shed my clothing, perhaps for the last "strip-search" of my life. After going through the usual routine of "lift-em" and "spread-em." I got dressed, backed up to the cell door, and was handcuffed.

While this was going on, an eerie silence had settled over the entire cellblock. There was none of the usual boisterous yelling, laughter, loud radios or TV's playing, Nothing, complete silence. Then, as I backed out of my cell and started that long walk, the cellblock erupted into a cacophonous uproar, "Stay Strong" and "Good Luck" the voices yelled out to me. As I bid them farewell, I vowed, "I'll represent us ALL well, no matter what happens, Stay Strong!!" meaning that I would not grovel and whine, as some involved in the process would like to see.

Along the way, as I walked down the long main corridor, loud voices rained in solidarity and encouragement greeted me as I passed each cellblock. The shouts from cellblocks caused escorts, and numerous guards that lined the corridor to become alarmed. The fear and terror of the past riot still fresh in their memories. In an effort to make me speed up the leisure paces I had assumed, meeting each and every eye along the way, they started walking faster. I maintained my stride, and soon they slowed down, resigned to the pace I had set.

Upon arriving in J-1 Super-Max, I was once again strip-searched and my regular death row clothing exchanged for death house clothing. "Odd" I thought to myself, "What difference does what one is wearing have on the fact of ones impending death?!!"

The atmosphere of the Death House was smothering, suffocating, as if there were a shortage of oxygen. Everyone moved as if in slow motion. Their every move seeming to have been thoroughly rehearsed, learned, robot-like professionalism, as now, for the first time in over 30 years, they, the elite Death Squad had been called up individually.

Shortly after entering the death cell proper, my attorneys arrived to inform me as to the current state of my situation. We discussed this at great length, and I felt confident that everything possible was being done to halt the insidious plot to murder me that had been set into motion by the State of Ohio.

After enjoying the time spent with my lawyers, I immediately contacted my woman, and later, other family members on the phone that had been provided. I tried to explain the situation, based on my knowledge and information provided me by my lawyers. This was very difficult, given the fact that they all were aware of the appeal process, and knew this latest attempt by the state of Ohio to murder me was simply a political move, and not based upon law. I still wanted to calm their fears, give them strength, and assure them all that everything was under control, and my lawyers were on top of everything, every move the state was trying to make.

For the most part, I remained in constant contact with my woman and family by phone, and was permitted to have a couple short visits with my lovely woman, engaging in spirited conversation with some of the people who had come down from the Ohio Public Defenders office, and I was truly touched by them.

At times, there were periods when time seemed to stand still, then suddenly speed up. I was offered food, but refused to eat, fearing that it may have been "doctored up" with drugs to make me less resistant and responsive. This refusal was not based on some unreasonable paranoia, but through years of incarceration. I know first hand just how devious prison officials can be, and I wasn't about to take any chances! The whirlwind of activity continued around me, and as night approached, there was no thought of sleep in my mind. Throughout the night I was on the phone talking to people I haven't heard from in years. Everyone expressing their support, love, concern, and pledging their assistance.

Monday morning, March 14th, 1994, was indeed a "Blue Monday" for us all as we learned of the apparent, unprecedented and mean spirited tactics being employed by the "honorable" Carl Rubin, the federal judge assigned to my case. It seems that even though he had my writ of habeas corpus and motion for a stay of execution before him since March 7th, he decided to wait until the "11th hour" before making a ruling, knowing full well

that the situation was critical, and time was of the essence. An example of the insidious plot he had hatched in his muddled mind, began when he instructed two of my attorneys to meet in his chambers at noon. At the conclusion of the meeting, he informed my attorneys that he would deny my motion for a stay of execution and that he would issue his ruling at approx. 3pm, 9 hours before my scheduled execution! He made this ruling with full knowledge that it was legally wrong, but in keeping with his own "personal" feelings about the length of time my appeal was taking, as he stated on one occasion "...there comes a time when all of this must come to an end." Now, he had appointed himself the Supreme litigator-usurping the power of the United States Supreme court, as well as that of his own district Court. Had it not been for the tireless efforts of my attorneys who fought gallantly, he may have well succeeded. Through their efforts, an emergency panel of the Sixth Circuit Court convened and issued a stay of execution around 6:30 pm.

Not to be outdone, Ohio Governor George V. Voinavitch personally contacted his friend, Ohio Attorney General Lee Fisher to form a pack and went to the United States Supreme Court, asking them to dissolve the stay of execution, and order my murder to occur as scheduled. This move was purely political, both having political aspirations with elections coming up this year, knowing how profitable jumping on the "Kill Us Quick" bandwagon.

After the U.S. Supreme Court in its entirety had been convened, they declined to lift the stay of execution at approximately 11:30 pm. Everyone breathed a great sigh of relief, including I might add, the correctional officers that had been present during the whole ordeal. Around 12:20 am Tuesday morning I was again escorted, however this time back to Death Row. Again the corridors were filled with loud cheers and good wishes, but it was when I arrived back on the "row" where I received the most thunderous ovations. Everyone had been following the events closely as they unfolded over the TV and radio, and were all aware that I was coming back.

In the aftermath of judge Carl Rubin's machinations with my case, he was removed from further involvement. This indicates and validates my previously held suspicions that he was overtly prejudicial towards me and my case, all death row prisoners, and was losing his Judicial temperament. To him, the bench from

which he's supposed to make decisions based upon the Law, had instead become a soapbox, upon which he had climbed to orate his personal convictions for those that are chomping at the bit for my death, complaining about the length of time my appeal was taking, it doesn't matter whether I'm innocent or not-All they want is to have their blood lust sated. Nothing else matters, Damn Justice, "Give Us The Body" they cry.

Many people have written and asked what it's like being on Death Row, being sent to the death house, and coming within thirty minutes of being murdered by the State? Why I refused to eat my last meal, and why I chose the electric chair instead of lethal injection? I will try to answer these questions based on my experience, as I'm sure it differs from some others that have been as fortunate as myself. To walk into the very Jaws of the Beast, and walk out again. Sadly, this has not been the case for many throughout this country that are similarly situated.

Being on Death Row, in and of itself, is a form of death. The environment sucks the life from you, and the passing of a single day at times can be but the blink of an eye, or as long as a heartbreaking life. Then there's the drudgery, the soul wrenching monotony of staring at the same steel, concrete, the same people, ad nauseam. Being taken to the death house is, in a way, a relief. Finally, one is afforded the opportunity to confront ones killers, who cowardly hide behind the mask of shamelessness. To look into their eye, smell their raw fear, and feel ones own strength being pitted against the ultimate sanction. Death.

As for the so-called last meal, and any refusal to eat it and other meals, as I said earlier, years of conditioned paranoia, coupled with the exigencies of events going on around me, eating was the furthest thing from my mind.

I chose the electric chair because I refuse to give any credence to the State's attempt to contrive a rationale for its murders, by offering a lethal injection as a "more humane" form of murder. If they were going to kill me, I was intent upon making it as ghastly as possible for all that bore witness to it.

What went through my mind during those 36 hours, were thoughts of my woman, people that I care about and love, and what my death would do to them and give them strength.

There is a plague in this country that is being controlled and manipulated by politicians, judges, prosecutors, police, professional victims, and victims rights groups. Until Society faces what's really going on in this country and starts wanting real answers for what's going on in our streets, a number of innocent people are going to be put to death, or imprisoned for the rest of their lives. This attitude of "Lock them up and kill them" is not the answer. Who do you think are going to be the ones filling our Death Rows, Prisons and Jails? Open your eyes before it's too late. The future of this Society is at stake until YOU the PEOPLE take off your blindfolds and look at the real problems, dealing with rather than sweeping them under the rug with a quick fix that has never worked. Crime is nothing new, the way it is dealt with is a reflection of the Society we live in. The reflection I see is a holocaust against the poor and less fortunate.

To all the Brothers and Sisters, mothers and fathers who are on Death Rows, Jails, and Prisons throughout this country, or struggling to get through the day to put food on the table, Stay Strong and don't give up. Stop turning on each other and stand United against the oppressors and raise your voices in Unity!■

[Johnny is a PLN reader on death row in Lucasville, OH.]

Reader Mail

Gangs in OH

Earlier this year I found myself locked down in a series of segregation units, ultimately being placed in administrative control. I was charged (and found guilty) of an all encompassing violation that reads: "Participating in or organizing, whether individually or in concert with others, any gang or disruptive group activity including but not limited to, possessing, displaying, wearing or using the materials, passwords, insignia or signs of such gang or group." The gang activity in question was the gathering of prisoners needed to litigate a class action lawsuit. The materials in question were pieces of the lawsuit which outlined the egregious conditions under which we were all being housed.

More and more, this comprehensive, all-inclusive charge [of gang activity] is being used to squash prisoner demands

before these demands are given even a modicum of thought. By silencing the outspoken prisoner, prisoncrats are crippling the grievance process. Prisoners are becoming more weary of pointing out errors and discrepancies in procedure because the end result is harsh retaliation that leads to placement in segregated control units at best, and administrative control units in maximum security penitentiaries at worst.

The staff in the prison where I was incarcerated affirmed that I could in fact solicit support for a class action lawsuit, that by doing so I had not violated any of the prison rules or regulations. But if I organized in any way then I would be charged with participating in disruptive group activities. This is clearly a Catch 22.

The end result is that not only are prisoncrats violating a prisoner's right to access to the courts, but they are also laying traps in an all-out effort to trample on and suffocate those of us who are already having trouble breathing.■

From G. OH

Trailer Visits Curtailed at CBCC

Editor's Note: In the March, 95 issue of PLN we wrote about the Clallam Bay, WA (CBCC) prisoner who stabbed his wife during a trailer visit. We got this update from a CBCC reader.

Now that the trailers have been reinstated with revised rules, anyone with a violent offense is excluded. If you have any violent or Class A infractions in the past five years or any drug related infractions in the last two years you are excluded. There are other stipulations in the new rules that I am not aware of due to my present situation in the IMU, but I can tell you that the changes made in a program that was once very beneficial to prisoners and their families, and had more than 110 CBCC prisoners participating now has only 27 who are still eligible.

Days before we went to press with this issue there was an uprising at CBCC on April 16, 1995. We have no first-hand accounts of the uprising, but according to the Seattle Times the disturbance was limited to one living unit which was extensively damaged. The uprising was reportedly quelled after three hours by guards using stun grenades■

S.H. Clallam Bay, WA

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Supreme Court Turns Back Parole Challenge

In the July, 1994, issue of *PLN* we reported *Morales v. California DOC*, 16 F.3d 1001 (9th Cir. 1994). The appeals court held that a California statute that was modified to allow for parole hearings every three years instead of every year violated the Ex Post Facto provisions of the US constitution. In a 7 to 2 ruling the supreme court has reversed that ruling.

Jose Morales is a California prisoner convicted of first degree murder in the killing of his girlfriend in 1971. He was released on parole in 1980 and plead guilty to second degree murder for killing his wife, whom he had met in prison. At

the time of his second murder conviction California law provided for annual parole hearings. This law was later amended to allow for parole consideration hearings every three years for those prisoners who had been convicted of murder more than once.

Morales first became eligible for parole in 1989 and was found unparoleable. His next hearing was scheduled three years later. Morales filed a habeas corpus petition claiming that the change in parole eligibility hearings violated his rights under the Ex Post Facto clause, namely that he was entitled to the annual reviews in effect at the time he was convicted. The district court dismissed the petition. The court of appeals for the ninth circuit affirmed in part, reversed in part and remanded.

The appeals court held that the provisions of the Ex Post Facto clause, which prohibit the government from punishing a crime more severely after it was committed than when it occurred, did not allow the state to change a prisoner's parole hearing dates. "Logic dictates that because a prisoner cannot be paroled without first having a parole hearing, a parole hearing is a requirement for parole eligibility... Accordingly, any retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause." The court reached this conclusion because denial of parole is part of a defendant's punishment.

The supreme court rejected the appeal court's logic. Justice Thomas wrote the majority opinion, holding that decreasing the frequency in parole hearings does not change the punishment for crimes already committed and thus, does not violate the

Ex Post Facto clause. Because the 1981 amendment only introduced the possibility that a parole hearing would not take place for another three years, this did not increase the punishment for the crime, it "simply alters the method to be followed in fixing a parole release date under identical substantive standards."

Anyone looking for a definitive answer as to what constitutes an Ex Post Facto violation will not find it here. "In evaluating the constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. We have previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition, and we have no occasion to do so here. The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause."

The court noted that 90% of initial parole hearings in California result in denials, with 85% found unsuitable at subsequent hearings. In light of those numbers the 1981 amendment was seen as a means of saving money and time for the parole board having to conduct hearings for prisoners it was not going to release. Moreover, the parole board retains the authority to conduct hearings more frequently than every three years if it decides that good cause exists to hold such hearings.

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Parole Challenge (continued)

"Even if a prisoner were denied an expedited hearing, there is no reason to think that such postponement would extend any prisoner's actual period of confinement. According to the California Supreme Court, the possibility of immediate release after a finding of suitability for parole is largely 'theoretical.'" "Given these circumstances, we conclude that the California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes. The Ninth Circuit's judgment that the amendment violates the Ex Post Facto clause is accordingly reversed."

In the past, the supreme court has held that the government may not "stiffen the standard of punishment applicable to crimes that have already been committed." See: *Lindsey v. Washington*, 301 US 397, 401 (1937), *Miller v. Florida* 482 US 423 (1987) and *Weaver v. Graham*, 450 US 24 (1981). These cases also concerned changes to state sentencing structures which affected how long the petitioners would remain in prison, in all cases longer than when the crime was committed which led to the Ex Post Facto violation. The court distinguished those cases from the instant case by noting that the change in parole board reviews did not alter Morales's sentence, it remained 15 to life. Nor did the amendment affect Morales's initial date of parole eligibility.

It appears that the reason for the court's ruling had more to do with limiting the caseload of federal courts than in applying constitutional principles. Stating that if it upheld the ninth circuit ruling and accepted Morales' argument "would require that we invalidate any number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement. Under respondent's approach, the judiciary would be charged under the Ex Post Facto Clause with the micro-management of an endless array of legislative adjustments to parole and sentencing procedures, including such innocuous adjustments as changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allo-

cation before a sentencing judge, . . . These and countless other changes might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release,..." As more and more states go to determinate sentencing and gradually phase out indeterminate sentences this ruling will take on greater importance than it may appear to have now. See: *California Department of Corrections v. Morales* 57 CrL 2021, April 26, 1995. 1995 WL 236561 (US). ■

4th Cir. Clarifies IFP Dismissal Standard

The court of appeals for the fourth circuit has limited the discretion of district courts to dismiss suits filed in forma pauperis (IFP) on grounds of frivolousness where the court believes the complaint is untimely. The court also discussed when a cause of action accrues in cases where the cause of medical injury may not be readily apparent. The case

involved a § 1983 suit filed by Maryland state prisoner Ghulam Nasim who claimed that while imprisoned between 1983 and 1989 he was denied medical treatment for stroke and spinal disk disease. He also claims to have suffered medical complications resulting from exposure to asbestos in prison. Nasim claimed that asbestos was falling from the prison ceiling into his cell and no notice or warning was provided that such exposure might be dangerous or that protective measures should be taken.

The district court dismissed Nasim's suit on grounds that it was untimely and barred by Maryland's three year statute of limitations which applies to § 1983 actions in that state. Nasim filed suit in 1993. He claimed he did not realize until 1991, after reading magazine articles, that his illnesses were the result of asbestos exposure. Nasim appealed the dismissal and the court of appeals for the fourth circuit reversed and remanded.

The appeals court noted that district courts retain discretion in dismissing only IFP suits that contain factual allegations that are fantastic, delusional or otherwise clearly baseless. Such complaints can be

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dismissed as legally frivolous only if its claims are based on an "indisputably meritless legal theory." Reviewing appeals courts must determine if either of these standards were met. The court compared this case with *Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994), where it upheld dismissal of an IFP petitioner's suit when the underlying legal theories had no merit.

Unlike *Adams* this case contained specific allegations by Nasim as to who violated his rights, how they were violated and when. The court noted that exposing prisoners to a toxic substance violates their eighth amendment rights. Thus, Nasim's asbestos exposure claim had legal merit. The court noted that the lower court had not concluded that Nasim's legal or factual claims were baseless but rather dismissed the claim solely because there was a meritorious affirmative defense to the suit, i.e. that the statute of limitations had expired.

The court gave a lengthy analysis, quoting cases from several circuits, on a district court's ability to dismiss an IFP suit based on an affirmative defense. [Readers will note that IFP dismissals occur before they are served on the defendants.] Concurring with other circuits that have considered this question, the court held, "Thus, prior to the filing of any defensive pleading asserting limitations, a district court only has discretion to grant a § 1915(d) dismissal on that ground when the limitations bar is clear from the face of the complaint.... For this reason appropriate review of such § 1915(d) dismissals requires appellate courts to examine carefully both the complaint and the legal principles governing the limitations defense." All circuits are in agreement on this issue and are cited in the ruling.

Applying that principle to the facts in this case, the court held that the limitations bar was not apparent from the face of the complaint. "A medical condition need not be diagnosed as such for an action on that condition to accrue, nor need a plaintiff fully understand the legal consequences of his or her condition.... Instead, a plaintiff need only be 'aware of his injury and its probable cause.'" The "discovery rule" tolls a statute of limitations until the plaintiff has, or ought to have, answers to two questions: Am I injured? Who injured me? At that point, the plaintiff has enough information to begin investigating his claims." See: *United States v. Kubrick*, 444 US 111, 100 S.Ct. 352 (1979).

The appeals court held that there was nothing to show that Nasim was aware that the cause of his injuries was the asbestos he had observed falling into his cell. Thus, it was not clear from the dismissal order or the complaint when his cause of action accrued, i.e. when he knew or should have known that the asbestos exposure was responsible for his illness. The court noted that asbestos injuries frequently lie latent for many years and Nasim had other medical problems which would explain why he may not have immediately recognized the asbestos exposure as the cause of his problems. The court held the record in this case needed to be more fully developed in order to determine when Nasim should have been aware of the cause of his injuries. See: *Nasim v. Warden, Maryland House of Detention*, 42 F.3d 1472 (4th Cir.1995).■

Private Physician Subject to § 1983 Liability

Private physicians who show deliberate indifference to prisoners' serious medical needs may be sued under 42 U.S.C. § 1983 even though they are not prison employees. With the increased trend of prison systems contracting out prisoner medical care this fourth circuit decision firmly reestablishes the state's obligation to provide medical care and does not allow the state to avoid liability by having private practitioners care for prisoners. Clay Conner, a Virginia state prisoner, was trampled by a steer during a prison livestock operation and suffered injury. He was examined by Dr. Kerry Donnelly at the Radford Orthopedic Center (RAC). Donnelly prescribed Motrin as part of the treatment even though Conner told him that it made his ulcers bleed. Conner complained about this to a prison physician as well and the prison doctor said he could not override Donnelly's prescription.

Conner visited Donnelly four times at the RAC over a six month period. After being informed of the hemorrhaging caused by the medication Donnelly refused to take any action on the matter and eventually refused to treat Conner. Donnelly was an employee of the RAC and neither he nor the RAC were employed by the state of Virginia nor had any contractual relationship with the state. The

state did however reimburse Donnelly for his services in treating Conner.

Conner filed suit under § 1983 claiming that Donnelly had been deliberately indifferent to his serious medical needs and thus violated his eighth amendment rights. The district court dismissed the suit finding that Donnelly had not acted under "color of state law." Its ruling turned on the fact that Donnelly did not have a contractual relationship with the state of Virginia to provide medical care to prisoners. The court of appeals, in an important ruling, reversed and remanded.

In *West v. Atkins*, 487 US 42, 108 S.Ct. 2250 (1988) the supreme court held that a private physician under contract with the state to provide medical services to prisoners acts under color of state law when treating prisoners and is subject to liability under § 1983. This is the first ruling by a circuit court that extends the reasoning of *West* to physicians not under contract with the state to provide medical services to prisoners. In doing so the court specifically overruled several district court decisions within the fourth circuit that had declined to extend *West* in this manner.

To prevail under 42 U.S.C. § 1983 a plaintiff must show that they were deprived of a federal constitutional right and that the person who deprived them of that right was acting under color of state law. Normally this second requirement simply means that the person was a state official (i.e. prison guard, policeman, etc.). In this case the lower court did not determine if Conner's rights had been violated, it dismissed solely on the basis that Donnelly was not acting under color of state law at the time.

The appeals court noted that it has not developed a comprehensive test applicable to all situations to determine whether a party has acted under color of state law. But three situations where a private entity's conduct constitutes state action, giving rise to § 1983 liability, are: "a private party acts under color of state law where there is a 'sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself...' Second, a private party acts under color of state law where the state, through extensive regulation of the private party, has exercised coercive power or has provided significant encouragement that the action must in law be deemed to be that of the state.... Finally, a private party acts under color of state law

Physician (cont.)

where 'the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'"

"The Supreme Court made clear in *West* that the provision of medical services to prison inmates is traditionally the exclusive prerogative of the state. Virginia has a constitutional obligation to provide adequate medical care to its prisoners because prisoners, due to their incarceration, cannot obtain medical care on their own.... The provision of medical services to prison inmates is the state's exclusive prerogative for the same reason it is its constitutional duty: a prisoner has no alternative means of acquiring medical care other than those provided by the state."

To meet its constitutional obligation, the "state employs its own physicians or pays private physicians to treat its prisoners... In either case, the state relies on the independent professional judgment of the physicians it has authorized to treat its prisoners." The court held that a physician's obligation to provide medical care do not set it at odds with the state. "Instead the physician cooperates with the state and assumes the state's constitutional obligation to provide medical care to its prisoners." "Although the independent exercise of professional judgment may otherwise indicate that a defendant did not act under color of state law, it is not relevant where the state employs the professional to fulfill the state's constitutional obligation.... As a general rule, then, a professional employed by the state to fulfill the state's constitutional obligations acts under color of state law; the narrow exception for public defenders, whose professional obligations make them the adversaries of the state, does not apply to physicians, who act on the state's behalf."

Relying on *West*, the court noted that a direct employment relationship with the state was not required to find that a private physician who had treated a prisoner had acted under color of state law. "Regardless of the physician's employment relationship with the state, any physician authorized by the state to provide medical care to a prisoner exercises power that is traditionally the exclusive prerogative of the state. If the physician abuses this power by demonstrating deliberate indifference to the prisoner's serious medical

needs, the prisoner suffers a deprivation under color of state law—not because the state has employed a bad physician but because the state has incarcerated the prisoner and denied him the possibility of obtaining medical care on his own." Thus, Donnelly acted under color of state law when he treated Conner.

That Donnelly had no formal contract relationship with the state was immaterial. The only reason he could treat Conner was because the state let him. "...when Donnelly accepted Conner as a patient and provided him with medical care, he acted under color of state law, regardless of the fact that he had no obligation to accept Conner as a patient in the first place." Likewise, the fact that treatment took place at the RAC and not in a prison or state facility was immaterial. "It is the physician's function while working for the state, not the place where he performs his duties, that determines whether he acts under color of state law."

The court stated that it reached its decision in this case so as not to undermine *West* by letting prison officials evade liability by contracting out prison medical care. "Given this concern, it follows that the state should not be able to relieve itself of its constitutional duty to provide adequate medical treatment to those in its custody by *not* contracting out its medical care and, instead, relying on informal relationships with physicians. The state's tactical referral of prison medical care to private physicians should not deprive the prisoners of the means to vindicate their Eighth Amendment rights."

In reaching this conclusion the appeals court explicitly and specifically rejected the reasoning employed in *Calvert v. Hun*, 798 F. Supp. 1226 (ND W.Va 1992). It also held that the Ruling in *McIlwain v. Prince William Hospital*, 774 F. Supp. 986 (ED VA 1991) was not inconsistent with this decision. See: *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994). ■

No Interlocutory Appeal of Discovery Order

In a sharply worded opinion the eighth circuit court of appeals has described the limited circumstances in which it will entertain an interlocutory appeal from a district court's discovery orders. The case involves Sherman White, an Iowa state prisoner, who filed suit under 42 U.S.C. §

1983 claiming he was placed in segregation as punishment for failing to reveal privileged attorney client communications. Prison officials claimed he was placed in segregation because of his suspected involvement in an assault on a prisoner and after he turned over illegal drugs to prison officials.

In connection with his suit, White's attorney sought discovery of the files created by prison officials in connection with their investigation of White's possible involvement in the assault. These files were created for any future criminal or disciplinary charges that might be filed, even though no charges have been filed in the three years the investigation has been "open". The defendants provided the files for *in camera* inspection by the court but resisted producing the files for White's attorney, claiming they were protected from disclosure as attorney work product and because disclosure would undermine prison security. The district court ordered the files produced to White's counsel, subject to a protective order. The defendants requested, and the court granted, permission to file an interlocutory appeal under 28 U.S.C. § 1292(b). In its order the district court certified that the immediate appeal was needed because there was substantial ground for a difference of opinion and an immediate appeal would materially advance the ultimate termination of the litigation.

The appeals court analyzed the history and purpose of interlocutory appeals, noting they should be "used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases." For a lower court order to be certified for an interlocutory appeal it must meet three criteria. "The district court must be 'of the opinion that' (1) the order 'involves a controlling question of law'; (2) 'as to which there is substantial ground for difference of opinion', and (3) that certification will 'materially advance the ultimate termination of the litigation.'" The court held that the state's appeal, and the lower court's certificate failed to meet any of these criteria and dismissed the appeal for a lack of jurisdiction.

The court held that no controlling issue of law was involved because lower courts generally have wide discretion in their discovery orders. Moreover, no grounds for a difference of opinion exists because the case law is uniform to the

effect that confidential files can be disclosed to counsel under a protective order. Furthermore, the appeal in no way advances the prospect of terminating the litigation. See: *White v. Nix*, 43 F.3d 374 (8th Cir. 1994).■

9th Cir. Upholds Attorney Fee Award

This is not a prison case per se. It involves the ninth circuit court of appeals upholding an award of attorney fees of \$66,535 in a case where the plaintiff only recovered nominal damages of \$1. Because prison litigation often involves small or nominal damage awards this case will interest any attorneys who do prison litigation. This case involves a citizen who was punched in the face by police while being arrested in a casino. The case went to trial solely against the city and the jury returned a \$1 verdict for nominal damages holding that the City of Reno had a policy that resulted in the use of excessive force and this policy proximately caused the plaintiff's injury. The court awarded attorney fees in the above amount and the appeals court for the ninth circuit affirmed.

42 U.S.C. § 1988 allows for the award of attorney fees in cases where plaintiffs succeed in proving their claims in civil rights suits. In *Farrar v. Hobby*, 113 S.Ct. 565 (1992) the supreme court held that because a judgment entered upon a verdict for nominal damages is actually enforceable, a plaintiff who wins nominal damages is a prevailing party under § 1988. But in determining the amount of attorney fees to be awarded a lower court must consider the amount of relief obtained. In *Farrar* the plaintiff obtained an award of \$1 and the lower court awarded fees which the supreme court held was improper due to the little relief achieved. In this case the city appealed and argued that even if the plaintiff was the prevailing party under § 1988 he was not entitled to a fee award under *Ferrer*.

The appeals court began by noting that § 1988 is intended to encourage the vigorous enforcement of civil rights protections. The court held "Nothing in *Farrar*, however, suggests that district courts may never award fees to a party who recovers only nominal damages. *Farrar* does not establish a per se rule that an award of fees premised upon an award of nominal damages is always an abuse of discretion.

Rather, *Farrar* teaches that district courts in the exercise of their discretion should consider the extent of success in calculating a fee award." So if the sole purpose of a suit is money damages and it achieves only nominal damages the party may deserve no fee award at all.

If a district court chooses to award fees after a judgment for only nominal damages has been entered, "it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damages. If the lawsuit achieved other tangible results-such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects-such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees."

The lower court is in the best position to determine whether an award of fees is justified in this type of case. It can best "ascribe a reasonable value to the lawyering it has witnessed and results that lawyering has achieved."

Applying these legal principles to the case at hand, the court upheld the award of fees in light of the fact that the plaintiff was an unsavory character (at the time of trial he was in prison in another state as a habitual offender, had an extensive criminal record, prior to being punched he had slashed a woman's face and kicked the policeman in the groin) and the suit achieved a great deal. Namely, it resulted in the police department changing its use of force policy because it was unconstitutional, the policeman was disciplined and these changes benefited society as whole. This type of principle will frequently be found in prison cases with prisoner plaintiffs. See: *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir.1994).■

Appointment of Counsel

In the February, 1994, issue of *PLN* we extensively discussed the third circuit's ruling in *Tabron v. Grace*, 6 F.3d 147 (3rd Cir.1993) which set forth the standards district courts should use when ruling on *pro se* prisoner plaintiffs' motion for appointment of counsel. The ruling was an important one from the third circuit because it was the first time it had addressed the issue in a comprehensive ruling. The case was remanded to the lower court with instructions to apply the enunciated principles and decide if coun-

sel should be appointed. The lower court decided to appoint counsel.

The case involves Harvey Tabron, a Pennsylvania state prisoner who claims that prison officials witnessed and allowed another prisoner to attack him and failed to take appropriate steps after they overheard the prisoner threaten him. Shortly after filing suit Tabron filed a motion for appointment of counsel which the court denied. The district court later went on to grant summary judgment in favor of the defendants and dismissed the action. The appeals court reversed on the appointment of counsel ruling and remanded the case for further proceedings. The appeals court did not address the summary judgment ruling because if counsel were appointed the record in the case was likely to change.

On remand Tabron again sought appointment of counsel. The district court applied the test enunciated by the appeals court: whether there was, as a threshold matter, any legal or factual merit to the plaintiff's claims; the plaintiff's ability to present the case (i.e. education, literacy, prior work experience and prior litigation experience); restraints placed upon prisoner litigants' ability to prosecute their claim due to their incarceration. The complexity of the legal issues involved must also be considered and "should lean in favor of appointment if complex." Other factors to be considered by the court are whether the case entails a need for factual investigation; the plaintiffs ability to carry out such investigation; the likelihood that a claim will involve substantial discovery and compliance with complex discovery rules and whether credibility determinations are involved that may require the experience of one trained in the presentation of evidence and cross examination. The court should also consider the difficulty of confined individuals in litigating their claims.

"The court's consideration of all these factors, however, must be tempered by the practical restraints imposed by the scarce supply of attorneys willing to assume responsibility for representation of indigent parties, and the court's inability to require counsel to undertake such representation."

Applying these principles the court first examined whether Tabron's claims had any merit. The court gave a detailed discussion of prisoners' eighth amendment right to be protected from harm by other prisoners. Extensive case law from the third and other circuits is cited on this issue. The court held that Tabron had

Attorney Fee (cont.)

stated a valid legal and factual claim. The court held that applying the above principles appointment of counsel was indeed warranted. Based on these assessments the court denied the defendants summary judgment and vacated a previous order denying discovery.

However, after ruling to appoint counsel the court noted that it had been unable to find counsel willing to accept the case. "Nevertheless, the court does not believe *Tabron* encourages a decision against appointment of counsel simply because the court must exert considerable effort to locate willing counsel. It is an unfortunate state of affairs that so few attorneys are willing to accept appointment in these matters." See: *Tabron v. Grace*, 871 F. Supp. 227 (MD PA 1994). ■

Prisoners Entitled to Meaningful Ad Seg Review

New York state law has created a liberty interest for its prisoners to remain free from administrative segregation (ad seg) and prisoners cannot be held on indefinite ad seg status without meaningful review of that status. Prisoners have no federal constitutional right to remain free from ad seg but such a right may be created by state law. See: *Hewitt v. Helms*, 459 US 460, 103 S.Ct. 864 (1983). Julio Giano attempted to escape from prison and was placed in segregation and transferred to another prison. After his release from segregation he was stabbed and seriously injured. He was placed in involuntary protective custody and again transferred. Giano repeatedly sought his release from IPC status and prison officials refused, claiming his previous escape attempt and the stabbing (which Giano did not divulge the reasons of) justified his retention in segregation.

Giano filed a writ of habeas corpus in state court and that was denied. He then filed suit in federal court claiming that his continued segregation violated his federal rights. The defendants moved for summary judgment which the court granted in part and denied in part.

The defendants claimed that Giano was collaterally estopped from relitigat-

ing the same claims he had litigated, and lost, in the state courts. The court noted that a state court habeas action will not automatically preclude a § 1983 action because money damages are not available in state court. In this case the court held that Giano was estopped from relitigating the equal protection claim he had raised.

The court held that Giano's due process claims were not estopped as he was now specifically challenging the constitutionality of Prison Directive 4933. Giano claimed that he was denied due process because the defendants failed to provide for a meaningful review of his status in administrative segregation.

The court began its inquiry by noting that New York state prisoners have a protected liberty in remaining free from ad seg. See: *Russell v. Coughlin*, 910 F.2d 75 (2nd Cir. 1990). Based on this, the court concluded that Directive 4933 created a liberty interest that prisoners can enforce in federal court via § 1983 if prison officials do not obey it.

The court noted that all 70 of the ad seg review forms state that Giano was placed in ad seg due to the escape, the stabbing and conditions at Attica. But the court noted it was not clear that he was kept in ad seg for these reasons. The court noted that a prison snitch named Melvin Richardson had informed officials of who committed the stabbing but officials did not investigate the information in order to resolve Giano's ad seg status.

The court notes that Giano was entitled to, and received, weekly ad seg reviews for the entire duration of his ad seg stay. The court relied on *Mims v. Shapp*, 744 F.2d 946 (3rd Cir. 1984) which had held that a prisoner held for a year in ad seg with nothing more than a rote review was denied due process because it denied a "meaningful" opportunity to be heard. "To ensure that periodic review does not become simply a sham, the content and substance of that review must be scrutinized under the fourteenth amendment." *Sourbeer v. Robinson*, 791 F.2d 1094 (3rd Cir. 1986). The court held that in this case Giano could have been provided with information regarding the reason for and length of his confinement as well as the dates and results of his reviews. "Furthermore, Giano could have been informed of what he needed to do to effectuate his efforts towards positive adjustment. Finally, after a specified period of time, perhaps Giano could have been given an opportunity to present informa-

tion that would have shown that he is no longer a threat to the facility. If some or all of these suggestions are utilized, the Supreme Court's concern of administrative segregation being a pretext for indefinite confinement could be alleviated."

The court held that there was factual dispute regarding the adequacy of the procedure for review of prisoners' ad seg status. The court held that the right to a meaningful review of a prisoner's continued ad seg status was well established and that prison officials were not entitled to qualified immunity on this issue. See: *Giano v. Kelly*, 869 F. Supp. 143 (WD NY 1994). ■

Unprovoked Assault States Claim

The sixth circuit court of appeals held that an unprovoked assault by Ohio prison guards states a claim for an eighth amendment violation. In doing so, the court rejected the prison guards' contention that unprovoked assaults do not, as a matter of law, state an eighth amendment claim. The case involves David Pelfrey who was assaulted by two prison guards who threatened him with a knife and cut off most of his hair with the knife when Pelfrey attempted to collect his mail. Pelfrey filed administrative complaints which went nowhere, he then filed suit under 42 U.S.C. § 1983.

The defendant prison guards responded with a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). They claimed that Pelfrey's complaint did not state a cognizable claim because even if the facts were true as he alleged, at most he stated a claim for common law assault and not for a violation of the eighth amendment's ban on cruel and unusual punishment. "The defendants argued that even if they had cut off Pelfrey's hair without provocation or justification, their actions did not constitute 'punishment' because it was not administered for penological or disciplinary purposes."

The district court agreed and dismissed the suit. "The court held that Mr. Pelfrey's complaint failed to state a cause of action arising under § 1983 because 'a spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment.' The court further held that, in order for an action to constitute punish-

ment, it must be imposed for penal or disciplinary purposes."

The court of appeals disagreed. The lower court had relied on *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir. 1973) and *George v. Evans*, 633 F.2d 413 (5th Cir. 1980) in reaching its decision. The appeals court noted that both of those cases involved decisions as to whether excessive force claims could be brought under the eighth and fourteenth amendments simultaneously. "Significantly, neither circuit intended to deprive prisoners of a federal forum and a federal remedy when prison officials are charged with the intentional use of excessive force."

The Supreme Court has held that "The Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. After conviction, the Eighth Amendment 'serves as the primary source of substantive protection...in cases.. where the deliberate use of force is challenged as excessive and unjustified.' Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the eighth amendment." *Graham v. Connor*, 490 US 386, 395, n.10, 109 S.Ct. 1865, 1871 n.10 (1989). Applying this ruling the sixth circuit had previously held that all post conviction excessive force claims must be raised under the eighth amendment. See: *Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir.1992). Thus, the lower court was in plain error by relying on *Johnson* and *George*.

Applying the standards enunciated in *Hudson v. McMillian*, 503 US 1, 112 S.Ct. 995 (1992) to the facts alleged in this case, the court held Pelfrey had indeed stated a claim. The defendants had not claimed that the assault on Pelfrey occurred as part of a good faith attempt to restore order or maintain discipline. "Nor can it be said that defendants' conduct furthered any other legitimate penological or institutional objective. Instead, it would certainly appear that defendants' actions... were designed to frighten and degrade Pelfrey by reinforcing the fact that his continued well being was entirely dependent on the good humor of his armed guards. To us, given the closed nature of the prison environment, this constitutes a totally unwarranted, malicious and sadistic use of force to cause harm."

"We categorically reject defendants' argument that 'an unprovoked attack is not punishment.' To hold otherwise

would ignore the power arrangements that exist within the prison environment and lead to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cell mate who is assaulted for *absolutely no reason* is afforded only that relief permitted by state law. Such a result is devoid of all logic and flies in the face of this Court's previous statement that 'the motivation of an assault' is relevant to the question of 'whether the measure taken inflicted unnecessary and wanton pain.' *Moore v. Holbrook*, 2 F.3d at 700."

In the lower court and on appeal the defendants argued that the portion of the complaint seeking money damages should be dismissed because it was not clear if Pelfrey was suing the defendants in their individual capacities. The court held there was sufficient notice to the defendants (Pelfrey had filed a motion to bar the attorney general's office from representing the defendants in this action because their conduct was in bad faith and outside the scope of their employment) to indicate that they were sued in their individual capacity. In any case, because the complaint was dismissed at an early stage of the proceedings it was still subject to amendment under Fed.R.Civ.P.15(a) The case was remanded to the lower court for further proceedings. See: *Pelfrey v. Chambers*, 43 F.3d 1034 (6th Cir. 1995). ■

Helms Amendment Ruled On

In the December, 1994, issue of *PLN* we analyzed various provisions of the federal crime bill that was passed that year. One of the provisions was the Helms amendment which limited the relief that federal courts could grant in class action suits brought by prisoners alleging overcrowding and such. At that time we predicted that the amendment would have little effect on prison litigation as it essentially codified already existing law. The first published case to deal with the issue seems to agree.

Prisoners at the Nebraska State Penitentiary (NSP) filed a class action suit challenging their conditions of confinement. After an 18 day trial the court found an eighth amendment violation with regards to prison officials' random placement of newly arrived prisoners in double cells. See: *Jensen v. Gunter*, 807 F. Supp.

1463 (D NE 1992). In August, 1994, the court issued an injunction regarding the double celling issue. In September, 1994, the federal crime bill, officially known as the Violent Crime Control and Law Enforcement Act of 1994, was signed into law.

The defendants in the case relied on section 20409 of the Act, (AKA The Helms Amendment) to move the court to set aside its decision on the issue of injunctive relief in this case. The amendment states in relevant part: "A federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment. (2) RELIEF. The relief in a case described in paragraph (1) shall extend no further than necessary to remove the conditions that are causing the cruel and unusual punishment of the plaintiff inmate.... A federal court shall not place a ceiling on the inmate population of any Federal, state, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners."

The defendants argued that under the amendment injunctive relief was not appropriate in this case because it was ordered by the court premised on the fact that overcrowding at NSP causes double celling. They also argued that the act eliminates the use of class action lawsuits to resolve claims that prison overcrowding violates the eighth amendment because individual plaintiffs must prove that overcrowding inflicts cruel and usual punishment with respect to each plaintiff prisoner. Further, that class representatives cannot make such an individualized showing in class action cases. The court rejected these arguments.

The court stated that this was not a "crowding" case within the meaning of the act because the court had found that the eighth amendment violation stemmed not from double celling per se, but from the random double celling of new prisoners without regard to individual data. Thus, the section does not apply because the court has not held prison crowding unconstitutional.

Most importantly, "... section 20409 of the Act has no application to these cases because these are class action lawsuits, and section 20409 does not by its plain terms, or by reference to pertinent legislative history, indicate congressional intent

Helms Amendment (cont.)

to apply the Act to class action lawsuits." Analyzing the act, the court held "By its terms ('an individual plaintiff inmate'), section (a)(1) of the Act pertains to lawsuits involving individuals. Thus, section 20409(a)(1) would bar a federal court from imposing injunctive relief in a case brought by one or more individual inmates beyond the relief necessary to remedy the specific overcrowding grievance of the individual inmate(s) who brought the suit. However, there is nothing in section 20409 that expressly seeks to alter or amend the long standing provisions of the Federal Rules of Civil Procedure authorizing the courts to issue relief to a "class" of individuals, so long as the class representatives prove the case for themselves and the unnamed members of the class. Indeed, the 'rule of construction' found in section (b)(2) of the Act strongly implies that Congress had no intent to limit the power of a court to issue class-wide relief". The court refers to the legislative history of the act to support this conclusion.

The court held that even if the Act did apply to this type of class, "there was sufficient specific evidence in the record as to each plaintiff (whether named or unnamed) to justify the remedial order which will be issued in these cases." The court referred to the findings it made in the liability stage of the trial which led to the finding that double celling at NSP violated the eighth amendments ban on cruel and unusual punishment. "There is nothing in the Act which prohibits a court from concluding that the trial evidence is sufficient to establish an Eighth Amendment violation regarding every member of a class even though they may not (and probably would not) know the name of each class member. Moreover, the relief chosen by the court does not employ an inmate population ceiling. In addition, the relief ordered is specifically limited so that it does not extend any further than necessary to remove the conditions causing the cruel and unusual punishment to each of the aggrieved inmates (whether named or described by class). Therefore the remedy employed by the court is consistent with section 20409(a)(2) & (b)(1) of the Act."

This is an important ruling because it is the first one to rule on the applicability of the Helms amendment. Undoubtedly it will be appealed by the state. We will

report rulings on the act as they appear. We ask our readers to advise us of any unpublished rulings concerning the Helms amendment.

In this case the court went on to award counsel for the plaintiffs \$198,286.20 in attorney fees, law clerk and litigation expenses. The court gives an extensive discussion and analysis of the accepted rates and expenses in Nebraska as well as computing attorney fees in prison cases such as this one. The court noted both the length of the case (nearly seven years) and the fact that counsel had to advance out of pocket litigation expenses from their own funds, with no hope of reimbursement if they did not prevail. This case will be useful for any attorneys who litigate class action prison suits. See: *Tabech v. Gunter*, 869 F. Supp. 1446 (D NE 1994).

This ruling also agrees with the analysis of the Helms Amendment prepared by Elizabeth Alexander, litigation director of the National Prison Project, which we reviewed in the March, 1995, issue of *PLN*.

Qualified Immunity Granted for Denial of Exercise

In the May, 1994, issue of *PLN* we reported *Allen v. City and County of Honolulu*, 39 F.3d 936 (9th Cir. 1994) which held that prison officials were not entitled to qualified immunity for denying a segregated prisoner at least one hour of exercise per day. In that case, the court held that the right to at least an hour of exercise a day was so well established, no reasonable prison official could have thought it was reasonable to deny it to a prisoner, in or out of segregation. [Editors' Note: For an extensive discussion of the case law and right of segregated prisoners to outdoor exercise see the January, 1995, issue of *PLN*. Back issues are still available for \$1.]

The sixth circuit court of appeals has reached the opposite conclusion. Morris Rodgers was a Michigan state prisoner in administrative segregation. He was later placed in disciplinary segregation for a 37 day period after being infraacted for a rules violation. According to Michigan DOC policy prisoners in disciplinary segregation are only afforded one hour of out of cell exercise a day for five days every thirty days. Rodgers filed suit claiming

that this violated his eighth amendment rights because he was entitled to at least one hour of out of cell exercise a day at least five days a week.

The district court denied the defendants' motion to dismiss or for summary judgment on qualified immunity grounds by holding that as of 1991, when this case arose, prisoners had a well established right to at least one hour of out of cell exercise per day. The defendants filed an interlocutory appeal on the qualified immunity issue and the court of appeals for the sixth circuit reversed and remanded.

The appeals court discussed the doctrine of qualified immunity which allows public officials to escape suit from damages unless the rights they violate are "well established." Examining MDOC Policy the court concluded that the policy authorizes segregation prisoners to be held without outdoor exercise for a thirty day period, whereupon they can exercise for one hour a day for five days, then be denied all exercise for another 30 days.

To determine if the right to exercise was well established in the sixth circuit the court examined two cases on the matter, *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983) and *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985). The court held that those cases "implicitly recognized a prisoner's general right to exercise where circumstances demand. The court was willing to allow the district court to set constitutionally required times, but only if, after considering the relevant facts, the district court could justify such minimums. Although in *Walker* we referred to the one hour per day, five days a week mandate in *Spain*, we stopped far short of endorsing that amount, or indeed any amount, as a constitutional requirement."

The court discusses numerous district court decisions from within the sixth circuit which discuss the amount of exercise segregated prisoners should receive, including *Pressley v. Brown*, 754 F. Supp. 112 (WD MI 1990) which involved a challenge to the same policy at issue here. Cases from several circuits which mandate at least one hour of out of cell exercise per day are discussed. But, because these cases were not sixth circuit cases the court held they do not constitute "clearly established" law in the sixth circuit. Thus, "a reasonable prison official would not have known that it was unconstitutional to limit a prisoner's exercise to one hour

per week, five days a week every thirty days as a means of punitive sanction."

It is important to note that this ruling only applies to the sixth circuit. It has also created a split within the circuits on this issue, at least as far as immunity from damages goes. While the appeals court reversed the lower court's denial of qualified immunity it also remanded the case, noting that Rodgers is still entitled to injunctive relief if he can show that the policy in question violates his eighth amendment rights. See: *Rodgers v. Jabe*, 43 F.3d 1082 (6th Cir. 1995).■

AA Probation Requirement Illegal for Atheist

In the May, 1994, issue of *PLN* we reported *Warner v. Orange County Dept. of Probation*, 827 F. Supp. 261 (SD NY 1993) which refused to dismiss a probationer's claim that being forced to attend Alcoholics Anonymous (AA) meetings as a condition of probation violated his first amendment rights because he is an atheist. The earlier case was only a ruling on the defendant's motion to dismiss. This case is a ruling on the merits, after a bench trial, where the court held that AA is a religious program and forcing atheists to attend it as a condition of their probation violates the establishment clause of the first amendment.

Robert Warner pleaded guilty to unlicensed operation of a motor vehicle and driving while ability impaired. He was sentenced to three years probation. Among the conditions of his probation was a requirement that he attend AA meetings. Warner went to AA meetings for about two years and complained to his probation officer about the religious nature of AA and asked to be excused because he was an atheist. His probation officer refused and Warner filed suit claiming that forced AA attendance violated his first amendment rights. Readers can refer to the earlier ruling in this case to note that the court analyzed the probation rules as if they were prison rules and applied the "reasonableness" test of *Turner v. Safely*. Thus, while this is a probation case it can be applied to prison programs that mandate AA attendance as a parole or programming requirement if the person is an atheist.

The court describes the heavy Christian and religious aspects of AA as a twelve step course and concluded that "the AA

meetings plaintiff attended were the functional equivalent of religious exercise, and this should be treated as religious exercise for purposes of the Establishment Clause." The establishment clause of the first amendment prohibits the government from either creating or favoring any religion or banning religious practices. Warner's central issue was that being forced to attend a religious program, AA, violated his right to non religion as an atheist.

The court agreed and found "that sending probationers to rehabilitation programs which engage in the functional equivalent of religious exercise is an action which tends to establish a state religion." While the defendants didn't intend to establish a state religion by forcing Warner to attend AA meetings, that was the practical effect. And it violated the first amendment. Finding that Warner's rights had been violated but that he had not suffered compensable damages the court entered an award of nominal damages for \$1. See: *Warner v. Orange County Dept. of Probation*, 870 F Supp. 69 (SD NY 1994).■

Denial of Food May Violate 8th Amendment

A district court in New York has held that depriving a prisoner of all meals for a two day period may violate the eighth amendment when imposed as a punitive sanction. Sean Williams is a New York prisoner confined in a control unit. After refusing to return a food tray prison guards withheld all other meals from him for a two day period. Williams claims to have lost consciousness and thus required medical attention. After this episode he suffered digestive problems, stomach and chest pains and dizziness. He filed suit contending that the denial of food for two days violated his eighth amendment rights, that the denial took place without a hearing also violated his due process rights.

The defendants moved for summary judgment and sought dismissal of the suit. They did not contest the facts set forth in Williams' suit. Instead, they argued that by refusing to return his tray Williams was refusing to accept his meals. The court denied the motion to dismiss, noting that the case was very similar to *Moss v. Ward*, 450 F. Supp. 591 (WD NY 1978) where a court held that denying a prisoner

food for four days was unconstitutionally disproportionate punishment for a prisoner's refusal to return a plastic cup.

The court held that the record showed Williams was denied five meals. Addressing the defendant's contention that Williams "refused" meals by not returning his tray the court noted a prison memo which instructed prison staff that any prisoner who refused to return all eating utensils would be subjected to a "deprivation of meals." Nothing in the record suggested that, at the time, prison officials considered a failure to return eating utensils to be a refusal to accept meals. Moreover, at the time Williams made it clear to prison official that he was not refusing to accept meals and that he objected to being deprived of them. The court emphasized the fact that Williams has never been accused of throwing feces, urine or food from his cell, which the eating utensil policy was supposedly designed to prevent.

The court noted that there is little case law on whether depriving a prisoner of food constitutes a constitutional violation [Editor's Note: Perhaps because the point is rather obvious.] and cites the published cases dealing with this issue. The key issue is how long a prisoner is deprived of food. While missing one or two meals likely does not violate the constitution, courts have held that depriving prisoners and detainees of food for two days or feeding them only once a day for two weeks does state a claim for an eighth amendment violation. See: *Hodge v. Rupert*, 739 F. Supp. 873 (SD NY 1990); *Dearman v. Woodson*, 429 F.2d 1288 (10th Cir. 1970), *Robles v. Coughlin*, 725 F.2d 12 (2nd Cir.1983) and *Cooper v. Sheriff, Lubbock County, TX*, 929 F.2d 1078 (5th Cir. 1991). The court relied on correctional guidelines and standards from various sources, including the American Bar Association, Department of Justice and American Correctional Association, noting that current standards "require the provision of as many as three meals per day, and disapprove the use of food deprivation as a disciplinary measure." Based on these factors the court denied the defendants' motion for summary judgment. The court did not address the due process issue because the parties did not brief it. The case was set for trial. See: *Williams v. Coughlin*, 875 F. Supp. 1004 (WD NY 1995).■

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Retaliatory Infraction States Claim

An Illinois district court has reaffirmed that prisoners retain a first amendment right to complain about prison conditions without fear of being subjected to retaliation by prison officials. Selma Geder, an Illinois state prisoner, filed numerous administrative grievances complaining about prison conditions. In retaliation for such complaints he was infraacted for allegedly being "insolent" and disobeying a direct order. He was found guilty at a prison disciplinary hearing and punished. Geder filed suit under 42 U.S.C. § 1983 claiming that the retaliatory infraction violated his first amendment rights and that the disciplinary hearing was constitutionally deficient as well. The defendants moved for summary judgment which the court denied in part and granted in part.

"Prison inmates have a protected First Amendment right to submit written and oral complaints about prison conditions, and where there is evidence of retaliation against constitutionally protected speech, the protection of prisoner's due process rights does not shield prison employees from a Section 1983 claim." "To state a claim for retaliatory treatment, a complaint need only allege a chronology of events from which retaliation may be inferred." Geder presented affidavits that several days before receiving the infraction he had filed three grievances complaining of prison conditions. The court held this was sufficient to withstand summary judgment because the defendants did not present any evidence that their actions were not retaliatory.

The court rejected the defendant's reliance on *Hanrahan v. Lane*, 747 F.2d 1137 (7th Cir. 1984) that prisoners have no cause of action when they claim an infraction is retaliatory as long as they receive procedural due process protection at the hearing. In *Black v. Lane*, 22 F.3d 1395 (7th Cir. 1994) "the Seventh Circuit held that the issuance of false disciplinary charges can violate substantive due process if the charges were brought in retaliation for the exercise of a constitutional right." The court held that Geder had demonstrated "for purposes of this motion that retaliation was a substantial factor in Lt. Manning's decision to issue him the disciplinary ticket."

The court rejected the remainder of Geder's claims dealing with the deprivation of his property, being placed in segregation pending the disciplinary hearing, the conduct of the disciplinary hearing itself and the conditions of confinement. The ruling is interesting in that the court held there was sufficient evidence at the disciplinary hearing to have found Geder "guilty" of the misconduct. Yet the court had earlier held that there was sufficient evidence to show that the infraction was retaliatory in nature, Geder had argued it was also false and had sought evidence at the hearing to prove his innocence. Such a finding seems internally inconsistent. See: *Geder v. Godinez*, 875 F. Supp. 1334 (MD IL 1995).■

Confinement Claim Barred by Res Judicata

The May, 1995, issue of *PLN* reported on *Rooding v. Peters*, 864 F. Supp. 732 (ND IL 1994) in which the court found unconstitutional an Illinois DOC policy which required prisoners to serve at least 60 days in an IDOC facility, even if this meant holding them past their release date. Rooding had filed suit in federal court seeking money damages for being held past his release date, he had already won a habeas petition in state court.

This latest ruling in the case is the court granting the defendant's motion for judgment on the pleadings. The court held that Rooding's claim was barred under the doctrine of *Res Judicata*, which does not allow parties to relitigate the same issues once a judgment has been entered. The court held that because a state court had granted a judgment in favor of Rooding to the effect that his confinement was illegal he could not sustain a separate cause of action under § 1983. In response to Rooding's argument that money damages are not allowed in state court habeas proceedings (or federal ones for that matter), the court held that "plaintiff could have and should have petitioned the state court that the duration of his confinement was improper under his habeas corpus and mandamus actions, and joined his § 1983 damage claim or sought damages under 735 ILCS 5/14-105. *Koen v. City of Cairo*, 909 F.2d 992 (7th Cir. 1990); *Wozniak v. County of DuPage*, 845 F.2d 677, 681 (7th Cir. 1988)."

Illinois readers should make note of this ruling in light of the court's earlier ruling that prisoners affected by this IDOC policy would have to litigate their challenges to it individually. See: *Rooding v. Peters*, 876 F. Supp. 946 (ND IL 1995).■

NJ Sex Offender Registration Ruled On

In 1990 Washington state passed the Community Protection Act which contained provisions requiring that sex offenders register with police and it also allowed law enforcement officials to notify the public of the sex offender's address, criminal history, etc. Since then several other states have passed similar laws. New Jersey passed its Sexual Offender Registration Act (known as Megan's law, after a seven year old girl who was raped and killed by a paroled sex offender) in late 1994. The New Jersey law required that sex offenders register with police and allowed police to publicly disseminate the name, photo, home address, place of employment and other personal information about the registered sex offender.

Alexander Artway, a convicted sex offender, filed suit claiming that the law violated several provisions of the constitution including the ex post facto clause (which bans increasing the punishment of a crime after it is committed), the eighth amendment, due process, equal protection and privacy rights. Artway had been convicted, and released, before the law went into effect.

The court gave an extensive history of each of the issues raised by Artway. The court gave ample discussion to the cases which have upheld the Washington state sex offender registration, *Washington v. Taylor*, 67 Wash. App 350, 835 P.2d 245 (1992) and *Washington v. Ward*, 123 Wash.2d 488, 869 P.2d 1062 (1994) and those of other states, *Arizona v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992). The court also noted that despite these rulings, courts in other jurisdictions had struck down almost identical sex offender registration laws. See: *Louisiana v. Babin*, 637 So.2d 814 (Ct. App. La. 1994) and an unpublished ruling, *Rowe v. Burton*, No. A.94-206 (US District Court, Alaska, 1994).

The court did not consider the eighth amendment challenge to the statute even

though it devoted several pages to discussing the appropriate standard of eighth amendment review for legislative statutes. The court's indecision seems to arise from the fact that the supreme court has been split on this issue and "that clarity is now lacking as to the proper application of Eighth Amendment scrutiny to legislation such as that presently before the court."

The registration requirements of the statute were upheld as constitutional. The court held they did not violate any constitutional provision. However, the public notification requirement of the law (which is identical to that of Washington state's law in that it provides for public dissemination of sex offender information) was struck down as unconstitutional. The court held that while criminal records are available for public inspection Megan's law goes far beyond that by publicly disseminating sex offender's likeness, criminal history, residence, place of employment, etc., leading the court to find that the law imposed an affirmative disability or restraint on New Jersey sex offenders. The court held that the public dissemination of this information was punitive as a matter of law and violated the ex post facto provisions of the constitution in its retroactive application. Based on the language of the ruling it appears that the court did not consider whether the public dissemination aspect of the law would be constitutional to those convicted of sex offenses after the law went into effect. A conservative reading of the court's ruling is that the statute was held unconstitutional only to the extent that it allowed the public dissemination of sex offender's information if the offender was convicted and sentenced before the law was signed into effect. This ruling should provide a basis to challenge similar statutes in federal court in those states which have similar statutes which have been upheld in state courts. See: *Artway v. Attorney General of New Jersey*, 876 F. Supp. 666 (D NJ 1995).■

PA Class Action Settlement Published

The October, 1994, issue of *PLN* reported that on August 12, 1994, attorneys representing all Pennsylvania state prisoners had reached a settlement with prison officials of that state regarding almost every aspect of prison condi-

tions in that state. The district court has published the entire settlement agreement for those interested in it (copies were made available to PA prisoners before entry of judgment). The court noted that prisoners who objected to the settlement can still file individual lawsuit on any of the issues raised in the class action suit. The court noted it had received objections from 457 prisoners, or 1.9% of the class members. In its discussion of the settlement agreement the court addresses many of these objections.

The case is a useful reference point to anyone litigating institutional reform class action suits as well as to the Pennsylvania prisoners affected by the ruling. The court awarded the plaintiffs' attorneys, the National Prison Project, ACLU of Pennsylvania, Institutional Law Project and others, about \$1.4 million in attorney fees under 42 U.S.C. § 1988. See: *Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. 1437 (ED PA 1995).■

Denial of Witnesses Violates Due Process

A federal district court in New York has held that a prisoner's due process rights were violated at a disciplinary hearing when the hearing officer refused to call a guard as a witness and failed to interview the guard to determine what his testimony would be. Michael McConnell, a New York state prisoner, was infraacted and accused of two separate disciplinary violations, one involving drug possession the other weapons possession. Two hearings were held.

McConnell claimed his due process rights were violated at both hearings because the hearing officer refused to call guards as witnesses to testify on his behalf. The court held there was no due process violation at the first hearing because the hearing officer correctly held that the guard's testimony would be repetitive of documentary evidence present at the hearing, namely that he had signed the disciplinary report but had not in fact found the drugs.

The court reached the opposite conclusion with regards to the second hearing. Because McConnell was in segregation prior to his hearing he was entitled to assistance in "marshaling evidence and preparing a defense to disciplinary charges against him." Under *Eng v. Coughlin*, 858 F.2d 889, 897-98 (2nd Cir. 1988) this assistance includes gathering evidence and

interviewing witnesses. "At a minimum, an assistant should perform the investigatory tasks which the inmate, were he able, could perform himself."

In this case, the court relied on an almost identical fact situation in *Fox v. Coughlin*, 893 F.2d 475 (2nd Cir. 1990) to conclude that a hearing officer's refusal to interview guards who endorse an infraction report and then refuses to call them at the ensuing disciplinary hearing, violates due process. The mere fact that guards endorse a disciplinary report provides an insufficient basis to conclude that their testimony would be redundant. The hearing officer's refusal to interview the guard requested as a witness solely because the guard had endorsed the infraction report denied McConnell his right to due process.

The defendants argued that because a suspended sentence was imposed on the second disciplinary charge no harm resulted from the due process violation. The court noted that McConnell was only seeking summary judgment on the issue of liability, not damages. "A person who is the victim of a due process violation, even one that causes non compensable deprivation of liberty, is entitled to at least nominal damages." The court denied the defendants' motion for summary judgment on the issue of damages because McConnell had been denied parole based in part on the unconstitutional disciplinary charge, that issue needed to be resolved a trial. See: *McConnell v. Selsky*, 877 F. Supp. 117 (SD NY 1994).■

Dismissal for Failure to Amend Complaint Reversed

The court of appeals for the second circuit has held that a pro se prisoner's complaint should not be dismissed for failure to file a clear and concise complaint, failing to comply with the pleading requirements of Federal Civil Procedure and for failing to submit to discovery. Noah Simmons filed suit claiming that he received grossly inadequate medical care while he was a pretrial detainee in New York City's Rikers Island jail facility. After filing suit he requested appointment of counsel and sent the court a letter seeking summary judgment, both of which the district court denied. The court ordered Simmons to

Dismissal (cont.)

file a "clear and concise statement of his claim" so pro bono counsel could evaluate it. The defendants filed a motion to take Simmons's deposition in order to clarify his claims and Simmons did not respond to their letters. The defendants sought leave of the court to take Simmons's deposition and the court, on its own motion dismissed the action. The reasons given by the court were that Simmons's complaint was "confused, ambiguous, vague, and otherwise unintelligible" and not in compliance with Fed. R. Civ. P. Rule 8.

Simmons appealed and the court of appeals for the second circuit vacated and remanded. The appeals court discussed his pleading requirements of the Fed. R. Civ. P. which require complaints to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," noting that their purpose is to give the opposing party "fair notice" of the claims against them so as to allow them to answer and prepare for trial. While district courts have the power on motion or sua sponte (on their own) to dismiss complaints that do not comply with these pleading requirements, dismissal should be reserved for those cases where the complaint "is so confused, ambiguous, vague or otherwise unintelligible that its true substance, if any, is well disguised. Further, if the court dismisses the complaint for failure to comply with Rule 8, it should generally give the plaintiff leave to amend. This is especially true when the complaint states a claim that is on its face non frivolous."

District courts have the power under Fed. R. Civ. P. Rule 41(b) to dismiss complaints for failure to comply with court orders, treating noncompliance as a failure to prosecute. The appeals court disagreed with the lower court's characterization of Simmons's complaint. "We think it clear that Simmons's amended complaint gave defendants fair notice of the claims asserted." The complaint was sufficiently factual to identify the places, parties and actions involved and giving rise to the suit. Regardless of what the proof at trial may show, the complaint "could not properly be dismissed for failure to state a claim upon which relief could be granted."

The appeals court noted that the defendants never argued or suggested that the complaint did not meet the requirements of Fed. R. Civ. P. Rule 8 or that they did not have notice of the substance of Simmons's claims. Because the defendants were able to understand Simmons's claims and respond to them the court held that the lower court had abused its discretion in dismissing the suit. The court also held that Simmons was not given adequate notice for the dismissal because the lower court only told him he should file a more concise complaint in the context of his motion for appointment of counsel, not as a condition of proceeding with his suit.

The appeals court also rejected the rationale that the suit was dismissed for Simmons's failure to pursue discovery because nowhere in the dismissal order was discovery referenced. "Nor would a discovery-based rationale have been appropriate. Dismissal with prejudice for discovery failures is a harsh sanction that is to be used only in extreme situations," and only after the court finds willful disobedience to its orders and the party is given notice that violation of the court order will result in dismissal of the complaint. None of these conditions were met in this case. The appeals court awarded costs to Simmons for prosecuting the appeal. See: *Simmons v. Abruzzo*, 49 F.3d 83 (2nd Cir 1995). ■

Warden Survey Released

On December 21, 1994, Illinois US Senator Paul Simon (D) released a survey he had conducted of 157 prison wardens across the country. Simon told a news conference he was releasing the survey because it was time for a "reality check" as congress gears up for yet another crime bill.

Asked "Do you think most elected officials are offering effective solutions to crime?" 85% of the wardens answered "no." Only 10% answered "yes." Two thirds of the wardens surveyed stated that prison space could be better used by imposing shorter sentences on non-violent offenders to make room for those convicted of violent crimes. They also stated there were too many minor drug offenders behind bars.

At the news conference former director of the federal prison system Michael Quinlain stated that the combination of a massively growing prison population combined with the newly popular removal of privileges such as weights, televisions and recreation items could prove deadly. He said "I am worried there is going to be a disaster in our prisons. We will not be able to manage them effectively." ■

TDCJ Selling Counterfeit Meat

The Texas Department of Criminal Justice (TDCJ) is getting into the fast food business. This is a new and different type of fast food, though. What makes it "fast" is how fast prisoners whisk their trays to the garbage can to dump the fake soy-based meat substitute off of their trays.

The new soy product is called Vita Pro. Larry Kyle, the director of Texas prison industries, says that under what he terms a "gentleman's agreement" with Vita Pro Foods, Inc. of Montreal Canada, the Texas prison system will be the sole distributor of this new wonder product to cost-conscious prisons and jails all over the United States. The TDCJ hopes to make a cool, fast \$4 million on the distribution deal this year alone.

The Vita Pro fake meat has already been served to Texas prisoners for some time. Kyle says that if any of the prisoners have noticed the difference, none have complained. Maybe we should forward him some of the letters we have gotten from Texas readers with their spontaneous, unsolicited testimony on Vita Pro. One letter described the product as "looking and smelling like *Alpo* dog food," though in all fairness to Kyle, the author of that letter failed to make any specific complaints about how the product *tasted*.

It seems to be a trend nationwide that prison systems are scrambling to find ways to cut costs and turn a profit. For years politicians have gained office by exploiting "get tough on crime," "lock 'em up" and "build more prisons" rhetoric. It's a cheap political move because the "get tough" laws don't cost anything... at least not until the increased prisoner population starts to accumulate a few years later. Well, it's a

few years later and the bills are starting to come due. In this case the bill is being presented to prisoners on their dinner trays... and it looks and smells like *Alpo*. ■

CA Families Fight To Maintain Bonds

by Willie Wisely

Hundreds of family members, loved ones, friends, and advocates converged on the California Department of Corrections headquarters April 27, 1995, to express their support for family ties and opposition to a proposed administrative regulation which would eliminate family visits for a large segment of the prison population. Speakers, including volunteers from Pro Family Advocates, Family Net, Concerned Citizens for Prisoners, Friends Committee on Legislation, and the Prison Law Office, were limited to five minutes each. The public hearing ran from 8:00 a.m. to 5:00 p.m., when prisonrats shut the doors, turning away dozens of citizens, some of whom traveled over seven hundred miles, to voice their right to speak.

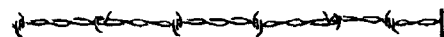
A rally was held directly in front of the hearing room from 12:00 noon until 2:00 p.m. Michael Satris, an attorney, and founding member of the San Quentin, California based Prison Law Office, was a featured speaker at the rally. Mr. Satris spent the morning in Marin County Superior Court moving for a prospective Temporary Restraining Order which would prohibit state prison officials from enforcing restrictions on family visiting if the administrative regulation is approved. Sources inside the CDC admit tens of thousands of tax dollars were spent to print over two hundred thousand copies of the rule *before* the hearing took place.

Tremendous statewide grass-roots organizing drew an unprecedented crowd to the hearing and rally. Most family members wore white tee-shirts, black skirts or pants, and a blue scarf or jacket to signify their unity and support for loved ones in prison. The fund raising efforts of groups like Family Net enabled many family members to travel from southern California to Sacramento for the event, although the few hundred dollars these groups raised pale in comparison to the \$40 million the prison guards' union rakes in each year in dues to be used to influence lawmakers.

In December of 1994, Mr. Satris obtained injunctive relief preventing the restriction of family visits for prisoners convicted of certain sex offenses. The restrictions were included in a budget trailer bill at the last moment without public debate or notice. The court declared that the restrictions singled out sex offenders, creating a suspect class in violation of state and federal constitution guarantees of equal protection under the laws. The proposed administrative regulation change, which would be included in California's Code of regulations, simply expands that suspect class. There is no rational relationship between the classifications of prisoners listed in the proposed rule and the elimination of the privilege of family visits.

This is only one of several measures the guards' union, and the two so-called victims' rights groups they sponsor, are taking to restrict or abolish family visiting. California Senate Bill 470, which, among other things, would have eliminated all family visits, was defeated April 18, 1995, in the California Senate Criminal Justice Committee following the testimony of Family Net volunteers. Assembly Bill 411, identical to the administrative regulation just proposed, was made a "two year bill" by the Assembly Public Safety Committee also on April 18, 1995. This bill may be brought up again at any time within the next two years.

The CDC has issued regulatory notices stating that the proposed family visiting restrictions will begin May 30, 1995. California prisons are not issuing family visiting dates beyond April 28th, anticipating an overhaul of the family visiting system. For many men and women who have life tops in the state's prison system, family visits are the only opportunity they have for bonding with spouses and children. "These people have nothing else to work for. They don't earn time off. California isn't granting paroles. This is it. And, the real tragedy is the family members, including small children, that will be harmed if they take these visits," said Ann Sullivan, a Family Net founding member who is married to a lifer. *[Editor's Note: as we go to press, a temporary restraining order has been issued preventing the family visiting restriction from taking effect. We will report more details in the Sept. 1995 issue.]* ■



NV Phone Rate Scalping Examined

In response to complaints from prisoners, family members and prison activists, the Nevada Public Service Commission (PSC) began work in December on a plan to regulate phone systems at jails and prisons. PSC Commissioner, Galen Denio, said he has to review testimony and documents from telephone companies and prison officials before deciding what action will be taken.

A proposed plan calls for caps on telephone rates charged to those who use phones in Nevada jails and prisons. Under the proposal, companies providing those phone services could charge no more than the highest rate of any long-distance company operating in the state. Operator surcharges on local calls would also be capped.

Though this may hardly sound like a good deal for prisoners—who could still be charged the highest rates of any phone customers in the state—it should provide considerable relief from the rate scalping that has been perpetrated on this "captive market." Mark Collins of Mound House, who is a former sheriff's deputy, said he was recently billed \$87 for a month's worth of calls to a friend in jail. He said the Nevada Bell rate for the same calls would have been \$29. Collins said the same prisoner's wife was billed for \$537 for calls from her husband over the same period, calls that would have been billed at the Nevada Bell rate of \$179. ■

MI Drug Patch Testing

A PLN reader submitted a copy of a MDOC memorandum from the acting warden of Egler Prison, in Jackson Michigan, which we quote in full:

"This facility has been selected to participate in a *Pilot Study of the PharmChem Sweat Patch* as a means for testing drug abuse. Beginning in early December, all prisoners at this facility who are selected for drug testing by submitting a urine specimen will also be tested with the PharmChek Sweat Patch. The Pilot Study will last approximately six (6) months."

"The patch is an absorbent pad contained in a hospital-like bandage worn on the upper arm or lower rib cage of the prisoner being tested. The patch is to be worn for a period of two weeks. At the end

MI Drug Patch (cont.)

of the two week period the patch will be removed and an additional urine specimen will be requested."

"During the pilot period no misconduct reports will be written based on the sweat patch test results. Misconduct reports will be written when a prisoner refuses to allow the patch to be applied, removes it without authorization, or tampers with it. Also, misconduct reports will continue to be written for positive urine tests, and refusals to submit urine."

"Any problems experienced with wearing the patch should be reported to staff immediately. If you have any questions concerning this matter, please contact your RUM/ARUM or Inspector Steward."

We also received a photocopy of MDOC Policy Directive 01.04.120 which is the current MDOC policy on the subject of "Research involving Corrections Facilities or Clients" which we will quote in part.

"Individuals committed to the care and control of the Michigan Department of Corrections are presented with a situation in which their customary freedom is restricted in various ways. The restrictive features of the institutions make coercive relations between residents [they mean prisoners] and staff always a potential danger. Therefore, exceptional care must be exercised in protecting all prospective or actual research participants' freedom of choice. Such freedom of choice must be guaranteed for all potential subjects who are to participate actively in any research, even if that participation involves nothing more than answering questions or expressing opinion."

"Coercion of any sort is not to be allowed; the decision to participate or not participate in any research shall not result in any sanctions, penalties, or loss of privileges."

An article in the January *Spectator*, the newsletter published in Egler, gives further information about how the patch works. The article also states, "Although the FDA has approved the *Patch*, and clinical trials have shown little or no difficulty wearing it, many of the Egler inmates have reported side effects ranging from rashes and puffiness to severe headaches. The testing continues."

There was no mention in the letter from the reader who forwarded us the memorandum or in the *Spectator* about what efforts, if any, Egler prisoners have made to challenge this coercive medical experiment. ■

Who's Treating the Doctor?

In September, 1994, the Washington DOC hired James McGuire to work as a psychiatrist at the McNeil Island Corrections Center (MICC). His work involves diagnosing and prescribing drugs to sex offenders, among other prisoners at the facility. This in itself is unremarkable. What is unusual is the fact that McGuire had lost his license to practice psychiatry in Alaska, and had to leave that state, because he had been having sex with a patient for a five year period. Alaska is one of the toughest states in the country to lose a medical license for medical malpractice, according to *PLN* sources.

Karma VanGelder, a former Alaska state trooper, testified before the Washington state Medical Quality Assurance Commission that McGuire was treating her for multiple personality syndrome and forced her to have sex with him. McGuire admitted having sex with VanGelder and is in group therapy. Kevin McGovern, McGuire's psychologist, said he thought McGuire was gaining insights into his problem and could safely handle the work at McNeil because he isn't interested in having sex with grown men.

The state asked the medical board to suspend McGuire's license to practice medicine here in Washington based on the Alaska suspension. The Department of Health asked that McGuire's license be suspended but he be allowed to continue a limited practice treating adult male prisoners with close supervision and continued psychiatric treatment for himself. The medical commission rejected both requests pending a full hearing on June 2, 1995.

Asked to comment, DOC spokesman Veltry Johnson stated that the DOC was fully aware of McGuire's Alaska suspension but hired him anyway based on his "qualifications" and the fact that his Washington license hadn't been suspended, yet. When legislators and irate citizens claim that prisoners are getting complete medical treatment and care they ignore the fact that the care providers are often poorly qualified, incompetent (see the July and October, 1994, *PLN* for the details on the death of Purdy prisoner Gertrude Barrow) and otherwise uncaring of prisoners' serious medical needs. In order to be paroled, go to minimum custody facilities, to a sex offender treatment program, etc., MICC prisoners must go through McGuire for a rec-

ommendation and evaluation. Is McGuire really in a position, qualified or capable of passing such judgments on others? ■

Source: *Post Intelligencer*,
April 22, 1995.

51 Months for Sex With Prisoners

Suspended Gulf County (Pensacola), FL Sheriff Al Harrison, 52, was found guilty by a federal jury on January 27, 1995, of seven misdemeanor counts of violating the civil rights of five former female prisoners at the Gulf County Jail over a period of several years. The jury found that Harrison forced the women prisoners to have sex with him in his office in exchange for furloughs and other favors. Several other women, including former prisoners, a former sheriff's department employee and the ex wife of a family friend, testified that Harrison had coerced sex from them or made advances they rejected. The prisoners' testimony was bolstered when FBI agents testified they had recovered semen from the chairs and carpets in Harrison's office that were shown by a DNA match to be his. Harrison took the stand and denied the charges against him.

On March 24, 1995, judge Lacy Collier sentenced Harrison to 51 months imprisonment. While the charges were only misdemeanors the sentences were run consecutive. Collier said he would normally exceed federal sentencing guidelines in cases involving the violation of the public trust but did not do so in this case because of Harrison's otherwise spotless 30 year career in law enforcement. Collier told Harrison, "We the people gave you, as we do all sheriffs, the power and the duty to incarcerate offenders, but they remain human beings."

Collier stated that he believed Harrison had committed perjury when he denied having sex with the prisoners in his office. The court said it considered this when calculating the sentence. Harrison claimed the semen got on the carpet and chairs because he had sex with his wife in the office once during a hurricane in 1985. The court ordered that Harrison receive mental health treatment while in prison and imposed a year of supervised release after Harrison is out of prison. ■

Source: *Palm Beach Post*
March 25, 1995

Violence Increases in Fed Prisons

BOP records show an increase of violence at the five older U.S. Penitentiaries at Atlanta, Leavenworth, Lewisburg, Lompoc and Terre Haute. Statistics from the two newer prisons at Florence and Allenwood are not yet available.

BOP records show that prisoner assaults on guards increased 11% in 1994 over the previous year. Prisoner on prisoner assaults increased a reported 28.5%. Ten prisoners were killed in assaults at the five prisons in 1994, compared to a total of nine during the previous two years. One BOP guard was killed in Atlanta, the first such killing in seven years.

Donald Tucker, president of the council of prison locals of the American Federation of Government Employees, attributes the increased violence to under staffing. According to BOP records, however federal prison staff have increased from 23,913 in 1992 to 26,265 late last year. And BOP projections call for a further increase to 40,000 staff by the year 1999.

Greg Bogdan, a spokesman for the BOP said that the reason there is more violence is because there are more prisoners. The total Federal prison population increased from 63,930 in 1991 to 85,540 last year.

Although the construction of new prisons in Florence and Allenwood have reduced overcrowding, the system is still operating at 126 percent of capacity. Atlanta and Lewisburg are both at 143 percent of capacity.

Kevin Wright, a criminal justice professor at Binghamton University in New York said the combination of long sentences and no parole is a cause of the violence. "As you start to lose hope, the rules of the game change, and inmates have less incentive to behave themselves," he said. "The removal of good time and parole have really been a significant change for [BOP] prisons."

Bogdon, while down playing the idea that BOP prisons are understaffed, said, "Obviously, anyone working in corrections, regardless of the security level of the inmates, is at some risk because you're dealing with people who don't want to be there." ■

SC Prisoners Protest Haircut Policy

In February, 1995, Michael Moore, a prison administrator from Texas, was appointed head of the South Carolina DOC. He promptly implemented the "get tough on prisoners" policies of recently elected Republican governor David Beasley. To date this has included cutting back on work release and furloughs and announcing a new policy which would require all prisoners to have short hair, be clean shaven and wear uniforms.

At 8:30 AM on April 17, 1995, a fight broke out in the cafeteria of the Broad River Correctional Institution in Columbia, SC, a medium-maximum security prison holding 1,000 prisoners. Sporadic fighting and fires broke out in various areas of the prison. During the uprising five guards were stabbed with four left in serious condition with stab wounds to the head, chest and back. During the cafeteria melee three prison employees were taken hostage and released eleven hours later after five prisoners were assured they would not be shot by prison guards and they were allowed to meet for five minutes with an Associated Press newsman and two photographers to complain about the haircut policy and other restrictive policies being implemented by Moore. The five prisoners who met with the media denied being involved in the stabbings.

Several of the prisoners stated they were Muslims or Rastafarians. A dreadlocked Willie Gary stated "What happened Tuesday, the new commissioner gave us an ultimatum. Anytime you come on a floor with no problems, a perfect floor with no problems... and make changes, you're going to get static." He stated prison officials should have expected this response to the new haircut policy "It is inhumane to deface a person." The other prisoners involved in the stand off with Gary were identified as: Theodore Harrison, Kevin Smith, Roderick Folks and Sheldon Crawford.

During the uprising prisoners at Broad River were locked in their cells. To keep the rebellion from spreading through the South Carolina prison system, DOC officials locked prisoners in their cells in the state's eight other medium-maximum prisons. Moore had no comments on the uprising.

In a statement that echoes Attica, Lucasville and other prison rebellions where pris-

oners have been pushed to rebellion, Harrison said "It comes down to the point where your soul is being taken, your dignity is being taken away, you've got nothing left." As Janis Joplin used to say, freedom is just another word for nothing left to lose.

The SC ACLU has stated that the haircut policy may well be illegal [See *PLN*, June, 1995, MO Haircut Policy Illegal where Missouri's haircut and "grooming" policy was found unconstitutional.] and has joined a court challenge of the haircut rule. Paula Brown, a prisoner's wife commented "Cutting their hair off and making them wear their [the prison's] clothes is not going to change anything. Why don't they just leave them alone?" Why not indeed. ■

AL Brings Back Chain Gangs

Ron Jones, commissioner of the Alabama DOC, has announced that it has ordered 300 sets of leg irons to the tune of \$17,000 so prisoners can be put to work for the first 90 days of their sentences. Jones is carrying out a directive from Republican Governor Fob James that new prisoners be denied television; that they be put to work, and that their first impression of prison "be so unpleasant that they never come back."

Alabama currently uses minimum security prisoners, without shackles, to pick up litter around highways. But over half of Alabama's prisoners have medium and maximum security classifications which do not allow them to work outside of prison compounds. "With leg shackles, we can put higher risk inmates to work" on the outside, said Jones. Jones stated the chains would allow five prisoners to work in a group with 8 feet of chain between the prisoners. The first chain gang will start in Limestone County.

Asked by the media, no one at the AL DOC could recall when or why the DOC had done away with chain gangs. The chain gangs will be used along heavily traveled interstate highways in full view of motorists. This would indicate that the actual purpose of the chain gangs is as a political propaganda tool of the Republican Governor rather than any penological goal of impressing newcomers to the Alabama prison system. ■

Source: *Topeka Paper*, March 2, 1995

FL Prisoner Has Right to Die

In 1972 Florida prisoner Michael Costello filed a lawsuit that eventually turned into a class action suit that resulted in improving living conditions, court access and medical care for state prisoners. Governor Lawton Chiles estimated that the costs to the state for litigating the suit, before it was settled in 1993, was \$4 million. On January 3, 1995, Costello went on a hunger strike to protest transfers to different prisons motivated by prison officials' desire to retaliate against him for his successful litigation. Prison officials sought to force-feed him and Costello went to court to prevent that from happening. Assistant Attorney General Amanda Wall, representing the DOC, argued that Costello was only trying to "manipulate the system" by going on hunger-strike.

On March 3, 1995, Martin County Circuit Judge Larry Schack ruled, in a sixteen page opinion, that hunger striking prisoners have a right to refuse food and medical treatment and starve themselves to death. Costello's right to privacy (readers will note that it is the right to privacy which upholds womens' right to abortions, most privacy right cases deal with abortion, contraception and the right to die) includes his right to refuse food and medical care. It was the right to privacy, and not Costello's first amendment right to protest, that formed the basis of the court's ruling. That right outweighs the state's asserted interest in preserving life, which given the number of prisoners Florida has murdered in executions is obviously not a consistent "interest." Schack prohibited the DOC from administering any type of medical care without Costello's permission.

The court also ruled that prison officials could not keep Costello in segregation because of his hunger-strike. "It is hard to imagine that if (Costello) dies as a result of his actions, that inmates will be rushing to imitate him.... As (Costello) continues to weaken, his ability to be a security threat or to cause any disruption will continue to diminish." Schack noted that Costello is clearly competent to make this decision and had skillfully represented himself *pro se* during court hearings over a five week period.

Costello, 44, had already lost 41 pounds within the first five weeks of his hunger strike. In the order the court said that he did not believe Costello was trying

to commit suicide, though he realizes he may die from refusing to eat without life-saving intervention. "It is interesting to note that suicide is not a crime in Florida. Assisting self-murder is." As we go to press we do not know the outcome of the

hungerstrike. This is the first ruling *PLN* is aware of where a court has upheld a prisoner's right to go on hunger-strike without state intervention. ■

Source: *Sarasota Herald Tribune*,
March 5, 1995.

Notes From The Editor

by Dan Pens

Paul says I can only have a thousand words; we have backlog of articles and cases waiting for space. So I'll get right to it. We recently started including a "drop card" in every issue. Sorry if they fall out and make paper cuts on your toes. So far we have had a positive response. The drop card makes it easier for people to send us donations or renew their subscriptions. They are also great for passing along to friends and family (encourage them to subscribe!). And when Bobo down the tier comes to borrow this month's issue of *PLN* you can just hand him the subscription card instead... maybe he'll get the message.

But along with the positive response, we have also gotten a lot of cards back with zero money and zero stamps, just a name, address and an "X" in the check box for "INDIGENT PRISONER RATE - Send what you can, we'll pro-rate your subscription." These guys don't even include a brief letter, just the card. If it costs us \$0.99 to produce one issue (See: Notes *From the Editor* in the May '95 *PLN*) how many issues should we "pro-rate" to somebody who sends us *zippo*? I spent a couple of hours doing an extensive spreadsheet analysis on that one, and I kept coming up with the same answer.

We get a lot of article submissions, and that's good. But the vast majority of them are totally unsuitable for publishing in *PLN*. All I can say is "get a clue!" If you read each issue carefully, and compare what we *usually* print, you should be able to figure out that we won't publish an 8,000 word essay on "How the Prosecutor Lied at My Trial." We print 1) legal analysis of prison rights cases, 2) news relating to prison rights struggle. "How the Prosecutor Lied at My Trial" is 1) is about an individual criminal case, and 2) the fact that the prosecution lied shouldn't be "news" to most of our readers. We get a lot of article submissions detailing accounts of how prisonrats have abused an individual prisoner. We simply don't have the space to print most of this stuff.

Again, the mere fact that prisonrats abuse prisoners is not "news." The mere fact that grievances or litigation were filed is also not newsworthy. If it's a case where struggle occurred, a network of support was developed, and some sort of change was brought about as a result of litigation or other struggle, that's the kind of "news" we'd have room to publish.

One last pet peeve (for this month.) If you write to us and request a response, send a S.A.S.E. We have a tremendous amount of correspondence to deal with. It gets to the point where if a letter comes without a S.A.S.E., we just don't have the time or resources to respond.

On another note, my wife lives in a house she shares with several other people. Recently they were interviewing a potential housemate. He said he was a "conservative." When asked what that means, he said, "I believe in people having personal responsibility." I guess he's the type of person they call a "ditto head." Poor guy. So I thought. .. "Gee, there oughtta be some way to let these young ditto head-types see what's *really* meant by that 'personal responsibility' slogan of the corporate/wealthy class." That's when it hit me. I'd like to get about 20 of these young conservatives in a workshop and invite them to play a game of musical chairs. Twenty chairs, twenty ditto heads. "Now when the music stops," I'd say, "I want all of the *responsible* people to sit down." No sweat. Plenty of chairs for everybody. Then I'd take five chairs away. "This chair," I'd explain, "is affordable housing; this one is a factory closing because the jobs are going to Mexico; this chair is federal funding for college scholarships, this one is affordable health care; and this last chair has to go because the unemployment rate is too high, and if we don't take this chair away the economy might overheat and inflation would set in." Then we'd play another round. We could have a terrific discussion about why the five people left standing weren't "responsible" enough to find a chair.

We get a lot of mail from *PLN* readers, and I want to thank those of you who send words of praise, gratitude and encouragement. It takes a lot of effort to keep this thing going. I appreciate the support we get from you.

I close with a few reading suggestions. There are some other outstanding publications that I look forward to reading each month. When Aunt Sally asks what you want for your birthday, Christmas, etc., tell her to send you a subscription to one of the following: *Z Magazine*, \$26/yr, 116 St. Botolph Street, Boston MA 02115-9979 — *Extra!*, \$19/yr, PO Box 911 Dept. V5EE, Pearl River NY 10965 — *The Nation*, \$35.95/yr (comes out weekly), PO Box 10791, Des Moines IA 50347-0791 — *Dollars & Sense*, \$18.95/yr, One Summer Street, Somerville MA 02143-9969 — *North Coast Xpress*, \$10/yr for prisoners (\$12/yr otherwise), P.O. Box 1226, Occidental CA 95465. I guarantee you won't be disappointed. And while you're at it, tell Aunt Sally to get a subscription to any of these for herself, too. Another reading tip. Get a copy of the book *The Mythology of Crime and Criminal Justice*, V. Kappeler, et al, 262 pgs, Waveland Press, street price approx. \$13.50. I'm only half way through this book, but it's a very well written analysis of how the government, media, and the corporate wealthy class create and exploit the mythology of crime.

My thousand words are up. Enjoy this issue of *PLN*. Pass it along when you're done. Encourage your family (like Aunt Sally), friends, and local law library to subscribe. ■

Book Review

Prisoners and The Law

Is the title of the four volume set by law professor Ira Robbins. First published in 1985 the set is regularly updated, most recently in December of 1994. While many books on prisoner rights give an overview of the applicable case law Robbins does that and much more. Numerous legal scholars, attorneys, judges, prison experts and others have contributed to this set, which allows for authoritative chapters written from different perspectives. It also includes several law review articles from law schools such as Harvard, Yale, etc. In addition to case

law and legal issues the volume also includes policy and philosophical issues such as privatizing prisons, the role of accreditation by the American Correctional Association, prison industries, the future of prison reform, etc. These chapters make the book invaluable for everyone from prison litigants, attorneys, judges, writers, and anyone interested in getting a broad overview of prison issues.

The book begins with an overview of the American prison system, its reliance on incarceration, the evolution of prisoner rights, correctional developments, resolving prisoner grievances out of court, modification of consent decrees and an overview of the law on prisoners' rights and means of enforcement. The first volume also deals with the litigation and enforcement of prisoners' rights broken down by amendment (i.e. first amendment, fourth amendment, etc.) and discussions of procedural due process, overcrowding, excessive force, death row conditions, parole, pardon and clemency, the rights of parolees and legal liabilities of prison officials. One section deals specifically with the procedural aspects of prisoner litigation, such as the role of magistrate judges, the provision of counsel and obtaining witnesses in prison cases.

The second volume focuses on habeas corpus litigation. Ample discussion is given to the doctrine of habeas and challenges to the duration (as opposed to the conditions) of confinement. Each aspect of habeas litigation is discussed with a special section of habeas law for death penalty cases.

The book also has a very interesting section on "Special Issues and Problems" which discusses the rights of gay prisoners, AIDS in jails and prison, blood testing prisoners, epidemic disease behind bars, the legal aspects of prison riots, inmate welfare funds, jail litigation, disenfranchisement of prisoners and ex-cons, the rights of deaf prisoners, the rights of women prisoners and the rights of Native American prisoners.

The remaining volumes discuss the future of prison reform and include large appendices on prisoner assistance directories, prisoner litigation status reports, statistics, etc. If your library on prison litigation will include only one book it should be this one. Highly recommended. The book is available from: Clark, Boardman, Callaghan, 155 Pfingsten Rd. Deerfield, IL. 60015-4998. The price is \$450.00, plus shipping & handling ■

Books Available:

Due to a shortage of space we are just giving short announcements to readers as to which books are available that may be of interest. The brevity of the review is no reflection on the quality of the book, just a matter of our being short on space.

Cages of Steel, edited by Ward Churchill and Jim Vander Wall is a compilation of essays and chapters by some fifty political prisoners and prisoners' rights activists about the reality of the American prison system. Of the books currently available on the American prison system this is the best one in terms of putting American policies of imprisonment into a social, political and economic context. The authors document how the United States criminalizes political dissent and holds many political prisoners, while denying it does so. An excellent book, highly recommended. 435 pages. ISBN 0-944624-17-0. Cost \$16.95 plus \$1.50 for US postage, \$3.00 for overseas postage. Available from: Maisonneuve Press, P.O. Box 2980, Washington D.C. 20013-2980, (301) 277-7505

Barred: Women, Writing and Political Detention, by Barbara Harlow, examines and presents the writings of women political prisoners in Northern Ireland, Palestine, El Salvador, Egypt, South Africa and the United States. The book gives an analysis of the dynamics of resistance movements and political detention, the educational and social role of prisons and the place and treatment of women as political prisoners. All too often the role of women in revolutionary movements is minimized or ignored. This book does an invaluable job of letting the world know about women's contributions to revolutionary movements and their struggles in prison as well. Harlow examines how prison literature affects the community, in and out of prison along with the role of women in liberation movements and the treatment of women political prisoners. Highly recommended. ISBN 0-8195-6258-0, Cost \$17.95 (paperback). Available from: University Press of New England, 23 South Main St. Hanover, NH. 03755. (603) 643-7107.

The Penitentiary in Crisis: From Accommodation to Riot in New Mexico, by Mark Calvin. The author is a former New Mexico assistant attorney general who was involved in investigating the

Book Reviews (cont.)

causes and effects of the Santa Fe prison riot in 1980. The book takes a fairly objective analysis of the rise of the American prison movement in the 60's and 70's and how this affected the New Mexico prison system. The prison struggle is put into a historical context of the upheavals then affecting society and how this impacted the New Mexican prison population. While a bit long winded at times the book gives a graphic account of the events leading up to the riot and the riot itself. Given the current tendency towards "tough on prisoners" laws, this book gives a good account of where such policies have led in the past. Cost: \$19.95 (hardback), available from State University of New York Press, State University Plaza, Albany, NY. 12246.

The Rise and Fall of California's Radical Prison Movement, by Mark Cummins. This is a history of the California prison movement from 1950 to 1980, focusing on San Quentin state prison and highlighting the role that prison reading and writing played in the creation of radical prisoner ideology in those years. This was an extraordinary era in California prisons, one that saw the emergence of a highly developed radical convict resistance movement inside the walls. Cummins examines writers like Chessman, Eldridge Cleaver, George Jackson, the Black Panthers, Black Muslims and the Symbionese Liberation Army and Black Guerrilla Family. Also described are how outside activists became involved in building the prison movement and how prisoner's books were able to reach far beyond prison walls to influence opinion, events and policy.

While the book is interesting we feel it has some shortcomings, namely it ascribes the collapse of the California prison movement to it being "too radical" rather than to repression by the state, the overall retreat of progressive movements with the Vietnam war being won by the Vietnamese, etc. A rebuttal pointing out these fallacies in greater detail than we can run here in *PLN* has been written by Marti Hiken, Director of the NLG's Prison Law Project and should definitely be read by anyone who gets this book. The rebuttal was printed in Prison News Serv-

ice, send them \$1.00 and ask for that issue (address on page 20 of *PLN*). Basically, we think Cummins's book is interesting but draws the wrong conclusions. People can read it and make up their own minds. It is available for \$16.95 (paper) \$45.00 (hard), ISBN 0-8047-2232-3, from: Stanford University Press, Stanford, CA 94305-2235. (415) 723-9434.

Prison Violence in America, by M. Braswell, R. Montgomery and L. Lombardy. The book opens with a letter from George Jackson, excerpted from *Soledad Brothers*. What follows is a rather detailed and scholarly examination of numerous aspects of prison violence. Included are chapters on the impact of *Ruiz v. Estelle*, a historical-statistical overview of prison riots, a detailed analysis of the Attica and Santa Fe riots, theories about the causes of prison riots, prisoner on prisoner violence, prison rape, prisoner on staff violence, staff on prisoner violence, political culture and its impact on staff violence, and more. The book is well seasoned with charts, numbers, graphs, and each chapter is topped off with footnotes and exhaustive source material references. The analysis of the Santa Fe and Attica riots seemed particularly relevant to current events. It would be wise for law makers and prison policy makers to dust off this historical information... or be condemned to repeating it. Cost is \$28.95.

Civil Liability in Criminal Justice, by H.E. Barrineau III. This 108 page book provides a minimalist and simplistic, but quite broad overview of §1983 litigation. It is aimed at criminal justice employees who are likely to be sued. The book is liberally spiced with relevant case citations, but rather lacking in detailed case law analysis. This book could be an invaluable tool to the novice litigator. It provides a useful road map of case citations to help a novice navigate through the case law relevant to various types of §1983 actions. The book lacks information on civil procedure and provides no examples of how to draft briefs or motions. For the beginner, though, the book could be used as an effective learning tool. Cost is \$16.95. Both *Prison Violence in America* and *Civil Liability* are available from the Anderson Publishing Company, P.O. Box 1576, Cincinnati OH 45201-1576. ■

Litigation Status Report Available

The National Prison Project of the ACLU has issued its latest, updated status report on state prisons and the courts. The report gives a detailed listing, by state, indicating which prisons and prison systems are under court order or consent decrees to limit their populations or otherwise improve their conditions of confinement. Only three states have never been involved in major litigation challenging overcrowding or prison conditions.

The report gives case citations (many of these cases have been going up and down the courts for, literally, decades) and summaries of the class action suits filed and what their current status is. This report is invaluable for anyone involved in major institutional reform litigation as well as anyone interested in the scope of this type of litigation over the years. The 18 page report is highly informative and available from the NPP (address on page 20) for \$5 post paid. ■

News in Brief:

WA: Dan Hughes, the city maintenance supervisor of West Richland used a work crew from the Coyote Ridge Correctional Center to fix the irrigation system, clean a forklift and paint a fuel tank at his home in 1992 and 1993. The prisoner work crew was under contract to do maintenance projects for the city. City officials have stated that Hughes will not be disciplined unless he is prosecuted. The State Auditor's Offices stated that Hughes' conduct violated state law on the use of prison slave labor. The Benton County prosecutor has not responded to *PLN*'s inquiry of whether criminal charges would be filed against Hughes.

D.C.: On May 22, 1995, a federal jury ordered the city's Department of Corrections to pay a total of \$1.425 million to six employees who were sexually harassed by DOC employees. It was the first time a government agency has been successfully sued on a class action basis for sexual harassment. The illegal conduct included demands for sexual favors and reprisals against those who refused or complained.

MI: As part of a growing national trend, the Michigan DOC has announced plans to ban smoking in all of its prisons

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by June, 1997. The plan to ban smoking will be implemented in a series of steps with smoking first being banned in segregation units. Past issues of *PLN* have reported smoking bans recently implemented in Texas and Oregon. One *PLN* reader in Texas reports that marijuana is cheaper and more readily available in Texas prisons than tobacco. Single cigarettes are being sold for \$3.20 apiece.

France: On April 22, 1995, eight political prisoners of the Basque Guerrilla group ETA went on hungerstrike to protest being kept in isolation. The prisoners, held at the Fresnes prison near Paris, have demanded access to the prison's gym, library and workshops like other pretrial detainees. Supporters of Basque independence have held a series of demonstrations supporting the prisoners across France.

South Africa: On April 27, 1995, president Nelson Mandela celebrated the nation's first anniversary of majority rule by reducing the sentences of tens of thousands of prisoners. The sentence cut takes 25% off the sentence of all prisoners serving less than a six month sentence. The remission was also applied to anyone charged before December 6, 1993, with weapons possession "associated with political conflicts of the past, irrespective of their political affiliation."

Venezuela: On April 27, 1995, a gang fight took place in the Sabaneta jail in the city of Maracaibo. At least three prisoners died and five were injured during the fight. Prison guards regained control after a two hour siege and released visitors that had been taken hostage by the prisoners.

MO: On May 5, 1995, Ted Heflin, superintendent of the Kansas City Municipal Corrections Institution was found in contempt of a 1993 court order prohibiting the early release of circuit court prisoners without the sentencing judge's permission. Heflin was sentenced to six days in jail and fined \$500 by circuit judge Anthony Romano who said "He does what he wants. I think he's so wrapped up in this so-called overcrowding policy that he doesn't care about anything else." Heflin will serve his sentence in the county jail.

France: On April 20, 1995, Magistrate Francois Sottet freed 26 foreign prisoners after Paris police refused to allow him and an attorney to inspect cells below the main courthouse building in Paris. The jail has long been condemned by human rights advocates as a "dungeon" where immigrants are held pending deportation and criminal charges. Sottet went to the jail to

investigate the beating of a Moroccan detainee who appeared in his court beaten so badly he could not stand, with a broken arm and bruises. The detainee said he had been beaten by other detainees who wanted to steal his jacket and money. Police lawyers filed appeals to the release orders. Recent controversies at the jail include a detainee hanging himself, eight policemen being suspended earlier in April for beating a prisoner and a guard charged with raping an Algerian transvestite prisoner.

MI: The DOC lost or settled 69 lawsuits in 1994, which cost the department (i.e. taxpayers) \$3.6 million. This was an increase from 51.7 million paid the year before.

CA: The Los Angeles city council has agreed to pay \$3.6 million to settle a class action suit against its police department brought by 55 citizens mauled by police dogs. Councilman Nate Holden commented that "the dogs are not there to do anything more than seek out the criminal and not to eat them once you find them." "If our dogs are eating these people,... it is going beyond the law." The suit was filed by the ACLU, NAACP and two law firms.■

Raze the Walls Burned

Raze the Walls (RTW) is a Seattle based anti-prison collective that has supported prison activists (including *PLN*), published a prisoner resource directory among other activities. On May 12, 1995, they suffered a big setback when the squatted house they occupied burned to the ground. Not only did they lose their home but they also lost their office space, computer, files, photocopies and everything else associated with the project.

Their recent letter to *PLN* states in part: "At this time we are attempting to replace all of the material that was associated with the project while trying to rebuild our personal lives. This will be a long and difficult process that we hope to have accomplished by August 15, 1995. Until then we will not be able to respond to current, past or future requests. If you have sent us money or stamps, sorry but those were lost in the fire along with your original letter."

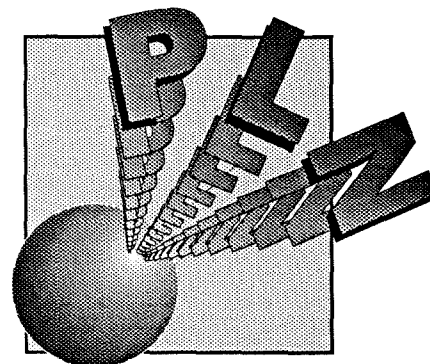
RTW can use any donations that folks can afford in order to get their prison

support work going again. They can be contacted at: RTW, P.O. Box 22774, Seattle, WA. 98122-0774. (206) 328-8571.■

Reader Mail

Health Problems in WY

We have a new Health Service provider that took over from the state. They worry about costs over and above prisoners' health care. The name of the provider is Wexford Health Services, Inc. Their home office address is 4500 PGA Blvd. Suite 302, Palm Beach, FL 33418. It is rumored that they provided services in Alabama ten years ago and were kicked out. Besides Wyoming they are providing services in Michigan, Illinois, South Dakota and Florida. I'm wondering if you could print something asking if any of your readers has information about past or present litigation against this company or has discovered any other information about them they would be willing to share. There are several suits filed against them in Wyoming, but none of them are in the discovery stages yet that I am aware of. We are having problems with them changing medication without doctors orders, not passing out medications in a timely manner or handing out the wrong medications to the wrong people. They deny surgery after the doctors have recommended it, have tampered with medical records, lied to the prison administration and are guilty of general incompetence. Please send any information to Andy Renken, 2121 Douglas Street Apt # 1106, Omaha, NE 68102.■



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Supreme Court Guts Due Process for Prisoners

On June 20, 1995, the supreme court issued its five to four ruling in *Sandin v. Conner*. The ruling appears to be the most devastating legal setback prisoners have suffered in the Supreme Court since *Turner v. Safley* was decided in 1987. In doing so the court abandoned, without specifically overruling, more than a decade of cases involving state created due process liberty interests affecting prisoners.

The case originally arose when Demont Conner, a Hawaii state prisoner, was infraacted for allegedly cursing at a guard during a strip search. He was infraacted and the disciplinary hearing com-

mittee refused Conner's request for witnesses claiming they were unavailable due to staff shortages and Conner's transfer to another facility within the prison. Conner was found "guilty" and sentenced to 30 days segregation. He administratively appealed and nine months later, after he had already served the 30 days segregation imposed, the infraction was expunged as unsupported by the evidence. Conner filed suit in federal court under 42 U.S.C. § 1983 claiming that his right to procedural due process had been violated.

The district court granted summary judgment in favor of prison officials. The court of appeals reversed and remanded the case at *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1993), *PLN*, July, 1994. The appeals court ruled that Conner had a due process liberty interest in remaining free from disciplinary segregation and that there was a disputed question of fact as to whether Conner had received a hearing comporting with the due process requirements of *Wolff v. McDonnell*, 418 US 539 (1974). The appeals court based its ruling on the fact that Hawaii prison regulations instruct disciplinary hearing committees to find prisoners "guilty" only when the charge is supported by "substantial evidence." (The supreme court has held that federal due process only requires "some evidence" in the record to support a finding of guilt in a prison disciplinary hearing.) The appellate court held that the rules in question created a due process liberty interest whereby Conner could not be segregated absent "substantial evidence" of misconduct. It also held Conner was entitled to call witnesses at the hearing. The supreme court has now reversed that ruling.

Chief Justice Rehnquist wrote the majority opinion, joined by justices O'Connor, Scalia, Kennedy and Thomas. Rehnquist begins his opinion discussing *Wolff*, which held that prisoners have no federal due process right credit for good behavior in prison, "but that the statutory provision created a liberty interest in a 'shortened prison sentence' which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct." The supreme court held that this liberty interest was one of "real substance" and set forth minimal procedures that must be met before such credits can be revoked. Rehnquist states: "Much of *Wolff's* contribution to the landscape of prisoners' due process derived not from its description of liberty interests, but rather from its intricate balancing of prison management concerns with prisoners' liberty in determining the amount of process due."

In *Meachum v. Fano*, 427 US 215 (1976) the court ruled that it was permissible to transfer prisoners from one prison to another, even if the conditions of confinement were dramatically worse at the new prison, because the transfer was within the range of custody which the conviction has authorized the state to impose. The court distinguished *Meachum* from *Wolff* because no state law or rule limited the discretion of prison officials in the former, while in the latter a state statute had created a liberty interest in good time credits.

The court discusses subsequent cases, mostly decided in the 1980's, where the court discussed state created liberty interests, *Hewitt v. Helms*, *Olim v. Wakinekona*, *Kentucky DOC v. Thompson*. The court has now abandoned that whole ap-

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Due Process (continued)

proach with the following criticism. "By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations." Rehnquist states: "Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison. Not only are such regulations not designed to confer rights on inmates, but the result of the negative implication jurisprudence is not to require the prison officials to follow the negative implication drawn from the regulation, but is instead to attach procedural protections that may be of quite a different nature."

In abandoning *Hewitt* the court claims that it had two undesirable effects. First, it created disincentives for states to codify prison policies in the interests of uniform treatment (after all, they might have to follow the very rules they have promulgated). The court states that such policies not only benefit prisoners but also the staff and are designed to instruct employees how to exercise the discretion vested in the prison system. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." Of course, no evidence is cited to support this rather broad assertion. The court claims that promulgation of policies helps ensure that similar treatment is given in similar situations. However, absent any type of judicial remedy how is this laudable goal supposed to be achieved or enforced? Given the wide body of litigation on this issue it is readily apparent that prison officials often do not follow their own rules, while holding prisoners to them.

"Second, the *Hewitt* approach has led to the involvement of federal courts in the

day to day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In doing so, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." [Editor's Note: This ruling was written by chief justice Rehnquist, who also authored the majority opinion in *Hewitt v. Helms*.]

The court held "The time has come to return to the due process principles we believe were correctly established and applied in *Wolf* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause... But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, see, e.g. *Vitek*, 445 US at 493 (transfer to a mental hospital), and *Washington*, 494 US at 221-222 (involuntary administration of psychotropic drugs), nonetheless im-

poses atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

The court rejected Conner's argument that any state action taken for punitive purposes encroaches on a liberty interest protected under the due process clause. The court distinguished this situation from other cases holding pretrial detainees and school children cannot be punished without violating the due process clause. "The punishment of incarcerated prisoners,... serves different aims than those found invalid in *Bell* and *Ingraham*.... It effectuates prison management and prisoner rehabilitative goals.... Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." In its haste to strip prisoners of the fourteenth amendment's protection, the court ignored the fact that the purpose of due process protection is not to say prison officials cannot punish prisoners guilty of misconduct, but to provide procedures that allow for a somewhat reliable means of assuring the

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prisoner punished is in fact guilty of something.

"This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence." While prior supreme court decisions had held, without deciding, that segregated confinement automatically triggers due process protection, it had never been ruled on by the supreme court in an argued case. "We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." This was because disciplinary segregation conditions were identical to those of administrative and protective custody. Rather than conclude that "administrative" and "protective" segregation were punitive the court draws the opposite conclusion to hold that disciplinary segregation is "normal." The court stated that Conner's segregation did not work a significant disruption in his environment.

The court also held the possibility that the Hawaii parole board might consider the infraction in denying Conner parole was too attenuated to require due process. "We hold, therefore, that neither the Hawaii prison regulation in question, nor the Due Process clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*. The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life."

To get a full understanding of the implications of this ruling readers should read the two dissenting opinions. In one, by justices Ginsburg and Stevens, they concluded that Conner had a liberty interest under the constitution and Hawaii prison rules, to avoid disciplinary confinement. Justice Breyer's dissent goes into greater detail of what is wrong with the majority ruling. He makes the obvious observation, noted in prior supreme court decisions, that segregation is a major change in a prisoner's environment. He notes that the majority's ruling is going to create quite a bit of uncertainty in the lower courts as previously settled law is called into question. The new standards are not elaborated nor examples shown to guide the lower courts in applying this new standard.

The majority opinion, which is now the law of the land, essentially strips prisoners of due process protections that can be enforced in federal court. There is going to be quite a bit of confusion in the lower courts based on this case. While it does not state that *Wolff* is no longer applicable to those disciplinary hearings that do not involve a loss of good time i.e. extending the sentence to be served in prison, lower courts may interpret it to mean just that. Especially since no prior cases are explicitly overturned. In last month's issue of *PLN* we discussed *Morales v. California Department of Correction* where the court, in a ruling by Justice Thomas, held that extending a prisoner's parole eligibility hearings after he is convicted does not violate the ex post facto clause. One of the reasons cited was the desire not to get the federal courts involved in whether increasing punishment after conviction is an ex post facto violation or not. The same concern, to decrease the ability of federal courts to enforce prisoners' constitutional rights with a resulting lesser caseload, seems to be the driving force in this case as well.

Old time prisoners have told me of the pre *Wolff* days when prisoners would be summoned to the captain's office and told "you're guilty of misconduct and you're going to the hole for six months," and that was that. Under this ruling, prison officials would be well within their discretion to do just that. See: *Sandin v. Conner*, 63 LW 4601 (1995). Readers will note that due to our lead time and a backlog of cases the next few issues of *PLN* will be reporting a number of pre-*Sandin* cases dealing with liberty interests and disciplinary hearings. It is too soon to tell how valid these cases are, or will be, in light of this ruling. We will report lower court rulings on the matter as they occur. ■

Pelican Bay Ruling Issued

One prisoner publication hailed it as "A Moral Victory for Prisoners." The headline in a correctional trade magazine proclaimed "State Wins Pelican Bay Suit." Interpreting the 345-page *Madrid v. Gomez* opinion is difficult at best, and as shown by the contrasting headlines above, a reader's interpretation can easily be swayed by personal bias. We at *PLN* have our personal bias, too. When reading Judge Henderson's lengthy commentary

and analysis, passages that pluck emotional strings fairly leap off the page. Other parts of the 345-page decision slide by like a coal barge on a lazy river. Sifting through it all to construct a practical legal analysis of the impact this decision will have on prisoner rights and on the future of super-max control unit proliferation is a formidable challenge.

Who won and who lost? The question can not have one answer. The Pelican Bay litigation was multi-faceted, and in order to tally up the score each issue must be examined separately. The main issues litigated were: A) Excessive Force; B) Medical Health Care; C) Mental Health Care; D) Conditions in the SHU (Security Housing Unit); E) Cell Housing Practices; F) Segregation of Prison Gang Affiliates. In each of these broader categories there are a number of sub-issues. We will attempt to cover as much as possible in this summary analysis.

Excessive Force - Findings of Fact:

A substantial portion of the trial was devoted to hearing claims of excessive force, reflected by the amount of attention Judge Henderson gave to that portion of the decision. The detailed accounts of brutality cited in the decision have a nightmarish, almost fictional sounding quality. Much of what we have left out in this summary and analysis are the numerous descriptive accounts of violent incidents of guard brutality. In some very harshly worded language, the Judge left no doubt that "the evidence before the Court is proof of the most powerful, unambiguous kind that a pattern of excessive force has become an undeniable pattern at Pelican Bay." But while it is easy to read the harshly critical prose in the decision and hail it as a "moral victory for prisoners," closer examination reveals the court maintaining a "hands-off" policy which leaves many of those same harshly criticized practices essentially chastised but unchanged.

Fetal Restraints: Fetal restraints, or "hog tying" were used as a form of in-cell "restraint" by Pelican Bay guards. The procedure involves handcuffing a prisoner's wrists, putting him in leg irons, and drawing a chain between the handcuffs and leg irons until only a few inches remain between the bound wrists and ankles. This procedure was sometimes done so that the prisoner's wrists and ankles were pulled up not in front, but behind their back. It was not uncommon for prisoners to be chained to their toilet in this

Pelican Bay (cont.)

manner. The court noted that "Such restraints were used for anywhere from a few minutes to 24 hours, with most instances falling in the three to six hour range. Current SHU policies permit the use of fetal restraints for up to 12 hours without obtaining the consent of the warden."

In analyzing the use of fetal restraints, as in all of the excessive force claims, several pages were devoted to the Findings of Fact in this area. Numerous instances were cited wherein guards used fetal restraints as a response to prisoners who kicked their cell doors or who merely "back talked" to guards. The court noted that "no expert [witnesses] at trial defended the use of fetal restraints."

The defendants argued that there was a "metal fatigue" problem with the cell doors that elevated the use of fetal restraints as a response to cell door kicking to a "security issue." Though the court noted that "prison officials were extremely vague" in their testimony about this metal fatigue problem, and "It is not credible that they would have waited [two years] to reinforce the holding cells, if in fact, metal fatigue presented a serious security concern." Again, the court is very critical of prison officials in their use of fetal restraints, and reading this part of the decision one is left with the impression that the court has made a clear determination that prisoncrats were utilizing fetal restraints on prisoners with little or no provocation, for prolonged periods of time, for no other reason than to inflict gratuitous pain. But that is where the "moral victory" lies. To determine the legal victor one only has to read the court's conclusion: "We do not, and need not, find every application of fetal restraint at Pelican Bay was punitive in nature. Nor do we address the facial validity of the prison's fetal restraint rule." In short, the court applies a generous tongue lashing to prison officials, but does so while keeping its "hands off."

Cagings: The court found that the practice of placing naked prisoners in telephone booth sized holding cages outdoors, in inclement weather, for prolonged periods of time "offends the most elementary notions of common decency and dignity. It also fails to serve any penological purpose in any kind of weather, much less cold and rainy

weather. The fact that it occurred at all exhibits a callous and malicious intent to inflict gratuitous humiliation and punishment." Yet, the court remains silent in regard to if or how this practice should be halted.

Cell Extractions: Again, the court devotes pages and pages to horror stories of cell extractions, and lavishes a generous amount of condemnation on prison officials for their ruthless use of force. The cell extraction "teams" are heavily armed and armored. They wear protective gear, wield plastic shields and metal batons, and employ all or a combination of 38 millimeter gas guns, tasers and mace or other chemical agents. Tasers were used in over 70 percent of the cell extractions through July of 1992. The 38 millimeter gas guns are routinely used in cell extractions. They fire high velocity rounds of rubber blocks which ricochet in an unpredictable pattern around the cell. One Captain testified that the round travels with enough velocity that even after ricocheting it could knock out a prisoner's teeth. A former warden of Pelican Bay testified of the gas gun rounds, "If it hits [the prisoner] in the wrong place, it can result in serious injury or death." In regard to the use of batons in cell extractions, the court said that it "has no doubt that the baton has been frequently used against inmates in ways beyond those authorized by formal cell extraction procedures."

But despite pages and pages of rhetoric about the high level of force used in cell extractions "especially considering that the target is almost always an unarmed inmate already behind cell doors," the court concludes, "We need not, and do not, find any particular weaponry or cell extraction strategy constitutes a per se use of excessive force." The court goes on to find that there is "a disturbing pattern [of excessive force in cell extractions]... that has caused substantial infliction of pain and left behind a string of injuries..."

Lethal Force: The court notes a plethora of incidents where "staff have resorted to firearms too quickly..." and, "that defendants are strikingly unconcerned that lethal force may be applied even when a lesser degree of force would be sufficient." The court also found serious deficiencies with the review process that is supposed to be followed whenever shots are fired. There were more than a score of shooting incidents that were never reviewed at all. The shootings that

were reviewed were done so in a manner described by the court as a "mockery." The shooting guard's incident report is "typically taken at face value and given little scrutiny, even where it fails to identify any facts that would justify the use of lethal force." The court notes that in many instances control booth guards resorted to lethal force "because prison administrators failed to supply them with alternative [non-lethal] weapons or because prison policies promoted the use of lethal force." [See: "FBI Investigates CDC Shootings" in the March, 1995 issue of *PLN* for more on this issue].

Yet, the court concludes its scrutiny of the application of lethal force with, "The record does not, however, support a finding that the decision to deploy firearms at Pelican Bay in and of itself constitutes a policy or practice of excessive force. Whether firearms should be integrated into a prison's security system is a matter best left to the sound discretion of prison administrators." Hands off.

To summarize the rest of the excessive force claims, suffice it to say that the same pattern is repeated. The court offers a generous amount of highly critical rhetoric, but little in the way of legal violations on which it might order specific relief.

Excessive Force - Conclusions of Law:

Judge Henderson gave a lengthy overview of eighth amendment law related to excessive force claims, and extended the law into new territory, at least in regards to the context of a class action excessive force claims. Prisoners and/or attorneys contemplating litigation of such a claim should obtain a copy of this decision and carefully study the court's analysis, a brief summary of which follows.

The court noted that the "pattern of excessive force" theory is well established in class action prison litigation. However, most, if not all, of those cases pre-date the Supreme Court's recent decisions in *Wilson* (which imposed a state of mind requirement in every eighth amendment claim and extended the maliciousness standard adopted in *Farmer*) and *Hudson* (which extended *Whitley*'s "maliciousness" standard beyond the context of a prison riot). Thus, the instant case raises a number of issues concerning the proper application of the subjective and objective components of the eighth amendment in class-action claims.

In regards to the subjective component, *Hudson* and *Whitley* clearly deline-

ate the "state of mind" standard necessary for an individual prisoner to prevail in an excessive force claim. The prisoner plaintiff must show that the defendant used force "maliciously and sadistically for the purpose of causing harm rather than in a good faith effort to restore or maintain order." Neither *Hudson* or *Whitley*, however, addresses the state of mind requirement in the context of a class action, where, as in the instant case, "the defendants are not individual officers accused of using excessive force in a particular instance, but Wardens and high ranking administrators who are charged with the overall operation of the prison."

The court distinguished the case at bar from *Farmer*, ("[W]here the decisions of prison officials... [to use force] are made in haste... an Eighth Amendment claimant must show... that officials applied force maliciously.") and *Hudson* (where, again, the court cited the time constants placed on guards who are applying force in the heat of the moment) because plaintiffs are alleging an overall pattern of excessive force rather than individual, isolated incidents wherein excessive force was applied. When alleging an ongoing pattern of excessive force, over an extended period of time, the court found that "there is no competing security or administrative interest that must be balanced under tight time constraints.... Indeed, the conduct alleged herein is the very antithesis of action under pressure—it is the practice of permitting and condoning a pattern of excessive force by subordinates, as reflected by defendants' management of the prison over an extended period of time."

The court concludes its analysis of the subjective component by stating, "...we are persuaded that *Hudson* does not require us to measure defendants' state of mind against a standard of maliciousness.... Rather, we conclude that... the subjective prong of the Eighth Amendment is satisfied by a showing of deliberate indifference."

The court goes on to conclude that a review of the record provides ample evidence to indicate that Pelican Bay (and CDC) administrators acted with deliberate indifference in regards to an overall pattern of excessive force (and indeed even acted to ensure that a pattern of excessive force continued). And though the court is applying the "deliberate indifference" standard to this case, they made it plain that the more stringent "maliciousness" test would also be satisfied by the record.

The court applied a similar analysis to the objective component, finding it unnecessary to conclude that individual guards "applied the force maliciously and sadistically for the purpose of causing harm.... Force can be 'excessive'—that is, unnecessary or grossly disproportionate to the circumstances—even when it is not inflicted with the malicious purpose of causing harm. For example, an officer could use an excessive amount of force because of lack of training and supervision rather than malice."

The court finishes its Conclusions of Law in regard to excessive force with the following: "While the Eighth Amendment will countenance prisons that are restrictive, and even harsh, it does not permit the pattern of needless and officially sanctioned brutality that has invaded operations at Pelican Bay. Not only have plaintiffs established a pattern of excessive force at Pelican Bay that has caused sufficient harm to demonstrate the 'infliction of pain' on a classwide basis, but they have also shown that this pattern is attributable, not to inadvertence or mistake, but to defendants' deliberate indifference and knowing willingness that harm occur. It is a conclusion we do not reach lightly. On the contrary, it is with considerable reluctance and regret that we find violations of this nature within an institution of our state. We are persuaded, however, that the testimonial and documentary evidence permit no other result."

Medical Health and Mental Health Care - Findings of Fact:

The court determined both the medical and mental health care systems at Pelican Bay to be grossly inadequate, and that "the evidence reflects defendants' deliberate indifference to those needs." The court cited inadequate staffing levels, inadequate training and supervision of medical staff, a medical records system that is "outrageously disorganized," failure to provide any consistent or meaningful screening of incoming prisoners, lack of quality control procedures, medical staff being intoxicated on the job, and a plethora of other shortcomings. The prison was actually opened with no physicians on staff. The Crescent City emergency room physician visited the prison one day a week! Staff has been added over the years, but has always remained woefully inadequate. Three years after the

prison opened, there was still only one physician for every 780 prisoners.

The medical/mental health portion of the decision also reads in part like a ghoulish horror novel. The record is replete with case after case of prisoners languishing in their cells dying of easily treatable illnesses, sometimes while begging for medical attention. The court concludes its Findings of Fact on the medical care issue by saying, "We find that by failing to remedy deficiencies in health care, Pelican Bay medical staff did not merely create a risk of harm to inmates but practically insured that inmates would endure unnecessary pain, suffering, debilitating disease, and even death. We agree with Dr. Start's opinion that '[t]he fact that a new prison with contemporary medical facilities nevertheless could be so shockingly deficient in its provision of health care is ... a terrible indictment of the defendants, and compellingly illustrates what... is their stunning indifference to the health care needs of the prisoners at Pelican Bay.'"

The court also cited "systemic deficiencies in the delivery of mental health care." The inadequate staffing levels and delivery of mental health care was found to be most serious in the SHU. What little psychiatric staff there are rarely visit the SHU, and as such untrained guards essentially make medical judgments that should be reserved for clinicians, and some prisoners are not given appropriate early treatment that could prevent or alleviate a severe psychiatric disorder. Also cited by the court were: inadequacies in mental health intake screening (or utter lack thereof), poor records keeping, delays in transferring mentally ill prisoners to other facilities for treatment, lack of proper mental health treatment procedures, failure to involve mental health staff in housing decisions, inadequate suicide prevention training and lack of a quality assurance system.

The court cited a number of examples that illustrate a pattern of Pelican Bay doctors failing to treat mentally ill prisoners, wherein the doctors found it more expedient to say that prisoners were "malingerers" who merely feigned mental illness in order to manipulate the system.

Following the pattern of most of the rest of his decision, judge Henderson concludes his findings of fact on the mental health care system with a harsh rebuke: "Defendants' response to the lack of adequate mental health care - and particularly the response of defendant Gomez, who has overall responsibility for the California

Pelican Bay (cont.)

Department of Corrections - reflects a deplorable, and clearly conscious, disregard for the serious mental health needs of inmates." The court goes on to criticize the CDC for showing little interest - despite this and related litigation - in addressing the systemic deficiencies in their mental health care delivery at Pelican Bay. At the time of this writing, it remains to be seen what form of relief may be ordered and if even that will bring about substantial improvement.

Medical Health and Mental Health Care - Conclusions of Law:

The court applied a straightforward analysis of *Estelle*, *Toussaint* and *Farmer* in regards to eighth amendment liability in inadequate prison medical services, and other rulings that have extended the same to delivery of prison mental health care services. The court found that plaintiffs met the burden of proof necessary to show that defendants were "deliberately indifferent" to "serious" medical needs of Pelican Bay prisoners, and that: "defendants (1) knew the risk to inmate health that this inadequacy posed, and (2) acted with disregard for this risk."

Included in this portion of the decision is an extensive discussion of what constitutes constitutional minima in regards to prisoner medical mental health care, and cites specific areas where glaring deficiencies exist at Pelican Bay.

Conditions in the Security Housing Unit - Findings of Fact:

The physical layout of the SHU is described in some detail. The interior is designed to reduce visual stimulation, producing an environment of stark sterility and unremitting monotony. One prisoner fairly described the SHU as being "like a space capsule where one is shot into space and left in isolation." Opportunities for social interaction with other humans are essentially precluded. Visits are conducted behind thick glass barriers via telephone handsets, precluding the opportunity for human touch. And because of Pelican Bay's distance from metropolitan areas, most prisoners get either few visitors or none at all. No phone calls are permitted. One expert witness, who has toured 20 to 25 segregation units in the country, concluded that Pelican Bay SHU prisoners are more isolated than prisoners in any other segregation unit he has experienced.

Considerable testimony was given in regards to the impact of Pelican Bay's stark SHU conditions on prisoners' mental health. As noted by the court, "Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hypersensitivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control.... This series of symptoms has been discussed using various terminology; however, one common label is 'Reduced Environmental Stimulation' or RES."

Defendants' expert witness, Dr. Dvoskin, acknowledged that it is "possible" that a "syndrome" could be associated with segregated conditions in confinement, although he does not believe there is sufficient data to support "an exact syndrome." A Pelican Bay psychologist, Dr. Ruggles, also observed that there was a "psychiatric deterioration that occurred in correlation to placement... [in the] SHU." He did not, however, explain the nature of the deterioration or know the cause.

The court employed the services of a psychiatric expert, Dr. Grassian, to address the issue of whether any of the psychiatric problems experienced by SHU prisoners are attributable to conditions in the SHU as opposed to other factors, and if so, the extent and degree of such problems. Dr. Grassian conducted in-depth interviews with over 50 SHU prisoners and reviewed their records. Fourteen of the prisoners were interviewed twice, some ten months apart.

Dr. Grassian concluded that in forty of the fifty prisoners he studied, "SHU conditions had either massively exacerbated a previous psychiatric illness or precipitated psychiatric symptoms associated with RES conditions.... Of these 40 inmates, 17 were actively psychotic and/or acutely suicidal and in urgent need of inpatient hospital treatment. The other 23 suffered serious psychopathological reactions to the SHU.... of the 40 seriously ill inmates, 28 suffered from perceptual disturbances, 35 had problems with concentration, 22 experienced intrusive obsessional thoughts, 29 suffered from paranoia, 28 had impulse dyscontrol, 25 had anxiety/panic disorder, and 24 suf-

fered from overt psychotic disorganization. Ten of the 50 inmates did not appear to be experiencing any significant psychiatric deterioration attributable to the SHU."

The court reviewed the entirety of the record bearing on the claim that Pelican Bay SHU conditions are on their face "cruel and unusual" and made a number of findings. Notably, the court concluded that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU."

Conditions in the Security Housing Unit - Conclusions of Law:

In this portion of the decision, the court finds that "the record and the law do not fully sustain the position advocated by either plaintiffs or defendants.... we are not persuaded that the SHU, as currently operated, violates Eighth Amendment standards vis-a-vis all inmates. We do find, however, that conditions in the SHU violate the standards when imposed on certain subgroups of the inmate population, and that defendants have been deliberately indifferent to the serious risks posed by subjecting such inmates to the SHU over extended periods of time." The "subgroups" referred to by the court are essentially "those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions of SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of *prior* [emphasis added] psychiatric problems or chronic depression. For these inmates, placing them in the SHU is equivalent of putting an asthmatic in a place with little air to breathe."

With the exception of the above "subgroup" of prisoners (and it remains to be seen if or how the CDC will classify prisoners to identify this subgroup and incarcerate them in some alternative to the SHU, or what that alternative might be) the court, relying heavily on *Toussaint*, takes a firm "hands off" position in regards to the overall design and operation of the SHU. "The severe restrictions on social interaction further defendants' legitimate interest in precluding opportuni-

ties for disruptive or gang related activity [Editors Note: With the notable exception of the heavily armed ninja-turtle goon squad "gang"] and assaults on other inmates and staff. For those serving short-term disciplinary terms, they also serve a punitive function. Other aspects of the SHU, however, appear tenuously related to legitimate penological interests, at least with respect to those inmates that are segregated in the SHU not as a disciplinary measure, but for other reasons. For example, it is not clear how the lack of an outside view, the extreme sterility of the environment, and the refusal to provide any recreational equipment in the exercise pen (even a handball) furthers any interest other than punishment and defendants have not advanced one. Thus, in the Court's view, the totality of the SHU conditions may be harsher than necessary to accommodate the needs of the institution with respect to these populations. However, *giving defendants the wide-ranging deference they are owed in these matters*, we can not say that the conditions overall lack any penological justification." [emphasis added].

The court concluded that though the SHU conditions "press the outer bounds of what most humans can psychologically tolerate..." they fall short of constituting a per se deprivation of a basic necessity of life. The court conceded that these conclusions are based on the record before it, one in which very few prisoners had been confined in the SHU for over a few years, and that "We cannot begin to speculate on the impact that Pelican Bay SHU conditions may have on inmates confined in the SHU for periods of 10 or 20 years or more."

Cell Housing Practices - Findings of Fact and Conclusions of Law:

Pelican Bay cell-assignment decisions are "made by correctional sergeants. Neither Pelican Bay nor the CDC have promulgated a written policy that sets forth criteria to be used in making cell-assignment decisions for either the General Population section of Pelican Bay or the SHU." A number of factors are typically considered by sergeants when making informal cell housing decisions, but consideration of prior history of cellmate assaults is not one of the factors considered.

A prisoner can make a formal request to be single celled and this request will be reviewed by a classification committee. But unless a prisoner has "actually killed a cellmate or the prison officials are con-

vinced that there will be some mortal danger to an inmate, single cell status is typically denied."

Plaintiffs contended that defendants failed to take reasonable steps to insure prisoners' safety by (1) routinely assigning prisoners with a history of assaults on cellmates to two man cells and (2) occasionally housing minimum security prisoners in two man cells with Level IV maximum security prisoners. These issues required eighth amendment review.

All parties agreed the subjective component of this claim is governed by the deliberate indifference standard in *Farmer*, in which the supreme court stated the objective component would be satisfied if the victimized prisoner was "incarcerated under conditions posing a substantial risk of harm." Though *Farmer* did not address prisoner on prisoner violence in the context of a class action, a number of lower courts have utilized a similar standard, typically requiring a showing of a "Pervasive risk of harm to inmates from other prisoners." The court goes on to provide a comprehensive analysis of case law relevant to "pervasive risk."

Some statistics on cellmate assaults were reviewed by the court, and it was shown that a number of Pelican Bay prisoners continued to be double-celled even after a history of three or more assaults on former cellmates. Some of these assaults resulted in serious injuries, including: fractured ribs, coma, paralysis and loss of eyes, and brain damage and disability.

The court found, however, that high level administrators had no actual knowledge of the extent to which prisoners repeatedly assaulted cellmates and were continued to be double-celled.

Thus plaintiffs failed to establish the prerequisite "state of mind" of the defendants to prevail on an eighth amendment claim.

The court found the record before it did not provide enough testimonial or documentary evidence to establish a history of cellmate assaults, or a risk therefrom, that was pervasive enough to implicate the eighth amendment. "Moreover, as found above, plaintiffs have not satisfactorily established that defendants knew the parameters of this problem. As such, plaintiffs cannot demonstrate that defendants' acted with deliberate indifference, even assuming the risk was pervasive."

The court concluded its analysis of the double-celling practices at Pelican Bay by stating that "we in no way condone the current failure of correctional sergeants to routinely consider prior assaultive behavior in making cell assignments and considering cellmate 'compatibility.' Indeed, this unfortunate and unexplained practice leaves those prison officials responsible for celling decisions vulnerable to incurring liability to any individual plaintiff who suffers injuries at the hands of a cellmate with an established history of assaulting cellmates. Further, with the issuance of this ruling, prison administrators at Pelican Bay will no longer lack actual knowledge of the problem. This, of course, would clearly bear on any future inquiries into the question of deliberate indifference."

With regard to the practice of housing minimum security prisoners with Level IV maximum security cellmates, the court again found the evidence before it "particularly scant" in regards to establishing a pervasive risk to minimum security prisoners and therefor declined to consider whether the evidence supported the requisite mental state of deliberate indifference.

Segregation of Prison Gang Affiliates - Findings of Fact and Conclusions of Law:

The Findings of Fact portion of the decision begins with a lengthy preamble, outlining and describing the problem of prison gangs in California prisons and the CDC's "pro-active stance in the area of gang suppression" before focusing on the facts specific to this case.

When a CDC prisoner is identified as a "gang affiliate" (or "validated" as the CDC phrases it) they are normally sent to the Pelican Bay SHU for an "indefinite" term, possibly to the end of their prison sentence. The only administrative procedure whereby they may be released from the SHU is for them to "debrief." That is he has to admit that he is a gang member, identify other gang affiliates, and reveal everything he knows about the gang's activities and organizational structure. This indeterminate term, and procedure for being released from the SHU is commonly referred to as "parole, snitch, or die."

In both its Findings of Fact and Conclusions of Law, the court focuses almost entirely on fourteenth amendment procedural due process, much of which will be called into question in light of the recent *Sandin v. Conner* supreme court decision (See related article in this issue of *PLN*).

Pelican Bay (cont.)

The court explores in detail the administrative procedure for identifying and classifying "gang affiliates" to the SHU, and the process used to review SHU status and debrief SHU prisoners. The Conclusions of Law provides extensive analysis on prisoners' due process rights in regards to these procedures. As stated above, much of that analysis will be called into question in light of *Sandin*.

With one minor exception, the court found the entire CDC system of identifying, classifying, segregating (in SHU), reviewing and debriefing "gang affiliates" to pass constitutional muster. The one exception was a finding of fault with the CDC for failing to provide a means of inserting information into an SHU prisoner's central file that some of the evidence used to classify them as a gang affiliate had later been found to be unreliable. This record keeping deficiency might lead the SHU review committee to retain a prisoner (because they had not paroled, died, or "debriefed" yet) whom they might otherwise "un-validate" and conceivably release back to population.

The court, by focusing almost entirely on the procedural minutiae of the SHU classification and review process of "gang affiliates" skirted or ignored some important underlying issues. The court barely mentioned that those gang members who chose to debrief do so at considerable risk, noting that "no evidence of actual reprisals was presented at trial." A number of prison staff testified, however, that it is generally considered that "inmates who debrief and gain release from the SHU are considered 'snitches' and thus face serious risk of being attacked or even killed by other inmates." And because of the CDC policy that debriefing is the *only* way to be released back to the population, any SHU prisoner who shows back up in a mainline prison is automatically assumed to be a rat. For that reason, there have been a number of prisoners who "debriefed" (and thus could have gained release from the hellish SHU conditions) but actually asked to be retained in the SHU out of fear for their safety should they be released.

The court noted the incentive for an SHU prisoner to debrief (in order to escape the harsh SHU conditions) is quite strong, and that there exists a "clear incentive to fabricate or exaggerate information

in order to gain release from the SHU." Also noted was the Catch-22 position a prisoner would be in if they were falsely identified as a gang affiliate and subsequently transferred to the SHU. Since such a prisoner would presumably have little or no knowledge of gang activities, membership or organization, the *only* way they could debrief is by fabricating such information... thereby continuing the chain of false accusations resulting in the inaccurate classification of other prisoners as gang affiliates and their subsequent imprisonment in the SHU.

The court addressed these concerns by noting that sufficient procedural mechanisms are in place, or can be added, to ensure that information used to classify prisoners as "gang affiliates" is reliable enough to "help prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens."

The entire SHU classification and review process is hauntingly similar to the "investigative methods" used in the hysterical Salem Witch trials. Once a young woman was identified as a "Witch" the only way she could avoid certain death was if she "debriefed" by supplying investigators with the names of other "witch coven affiliates" along with information about the witch coven's activities and organizational structure. History has clearly shown that many of the young women thusly accused chose to fabricate false information and falsely implicate others in order to escape torture and certain death.

Appropriate Relief and Further Proceedings:

The court noted that "Throughout this litigation, defendants have shown no indication that they are committed to finding permanent solutions to problems of serious constitutional dimension. On the contrary, defendants have expended most of their energies attempting to deny or explain away the evidence of such problems. Even when defendants modify certain policies (as they have done in the use-of-force area), they do not argue that such changes evidence an intent to address the problems raised by this complaint; rather, defendants typically assert that they were precipitated by unrelated matters."

"...the court is left with the opinion that, even given the evidence presented at trial, defendants would still deny that any condition or practice at Pelican Bay raises any cause for concern, much less concern of a constitutional dimension. Nor are we

confident, given the history of other [California] prison litigation, that defendants will promptly rectify constitutional deficiencies absent intervention by this court. See, e.g., *Thompson v. Enomoto*, 915 F.2d 1383, 1387 (9th Cir. 1990), cert. denied, 112 S.Ct. 965 (1992) (Court Monitor reports showed that state prison officials had not complied with decree governing conditions for death row inmates in 1988 and 1989); *Gates v. Deutmejian*, No. Civ. S-87-1636 LKK (October 27, 1994 order at 8) (finding state prison officials in contempt of decree after 'four-year pattern of delay and obstruction regarding the planning and implementation of a satisfactory OPP [Out-patient Psychiatric Program]'). The [CA] Office of Legislative Analysis has also observed that defendants have failed over the years to undertake adequate planning to address the medical needs of inmates in California prisons. See Trial Exh. [citation omitted] ('Our review indicates that, although the CDC has made some improvements in administration of its medical programs, the programs are too often characterized by a lack of adequate long-term planning, and 'crisis management,' often brought about by litigation.... The lack of long-term planning has been apparent over the years.')."

Considering the above, the court found it both necessary and appropriate to order injunctive relief to ensure an appropriate remedy to the constitutional violations at issue. The court ordered the appointment of a Special Master, Thomas F. Lonergan to oversee the development of an "appropriate remedy and to monitor the implementation of that remedy." Mr. Lonergan retired from the LA County Sheriffs Dept. in 1980 and has served as Special Master to the federal courts in eight previous cases.

The Court issued its order on January 10, 1995, allowing the parties 120 days (or such later deadline as the court may allow by way of extension) to "jointly submit to the Court any part(s) of such a plan that have been agreed to, or a statement that the parties were unable to agree to any aspect of a remedial plan."

PLN Editorial Notes

There were a couple of reasons why we delayed publication of this piece for as long as we did. For one, the decision is unpublished. A PLN supporter contacted the court asking why they chose not to publish such an important ruling, and urging them to do so. The judge's law clerk wrote back and informed him that the

court had changed its mind and had decided to publish the ruling after all. We have been waiting for them to do so, but to date (as of July 31, 1995) it remains unpublished.

We have also been awaiting word of what has developed in regards to the remedial plan, and what form the court's injunctive relief would take. We have not received any such information to date. We will keep you informed of future developments.

As far as who won or lost, and the final score... in the areas where prisoners arguably "won" (excessive force and medical/mental health care) the court repeatedly made it clear that although a number of Pelican Bay and CDC policies and practices were worthy of a generous amount of critical rhetoric, the court would essentially leave them unchanged. As to what specific changes the court may order, and if or how those changes will be implemented, that remains to be seen.

The prisoner plaintiffs failed to prevail on either of their claims in regards to cell-housing assignments. They also clearly suffered a resounding loss on the issue of segregating "gang affiliates" to the SHU under the "parole, snitch or die" program, and these issues need to be relitigated on grounds other than purely procedural fourteenth amendment claims.

Also considered to be a major defeat for the plaintiffs is the court's findings that the overall design and operation of the Pelican Bay SHU do not in and of themselves constitute a clear violation of basic human rights. The court made the exception for the housing of prisoners with prior mental problems in the SHU, but overall, the decision to leave the "worst of the worst" super-max control units in the country essentially wholly intact is a resounding defeat for not only Pelican Bay prisoners, but for all U.S. prisoners. The court has given the green light for the proliferation of super-rmax control units—even those as harsh as Pelican Bay—and politicians and prison-crats throughout the country are already moving forward with efforts to do just that.

We ask readers not to write and request a copy of the decision. We only have one (well worn) copy, and lack the resources to make copies and mail them out. The case number is: No.C90-3094-TEH. For now it is cited as: *Madrid v. Gomez*, 1995 WL 17092, (N.D Cal).■

WA Passes Record Anti-Prisoner/Defendant Legislation

By Paul Wright

In the March, 1995, issue of *PLN* I gave a rundown on most of the anti-prisoner and defendant legislation then pending in the legislature. After we had gone to press for that issue Ida Ballasiotes, the rabid chair of the House "corrections committee" (See *PLN*, March, 1995,) introduced HB 2010 which essentially rolled up a bunch of anti prisoner bills into one big bill. As detailed below, most of the proposed legislation passed but, not surprisingly, all legislation designed to rein in DOC growth and spending either died in conference committee or was vetoed by the governor. For those who still believe in "liberals," it's worth noting that nearly all of the below listed legislation passed both houses of the legislature unanimously, there were no token dissenting or protest votes. Here's a rundown on what passed and is now law.

Prisons and Jails:

HB 2010 is the reincarnation of HB 1054. The latter bill was prefiled in the legislature and sought to completely eliminate the Extended Family Visiting (EFV) Program, weights, "erotic" and "violent" materials and television from prisons. While TV's, EFVs and weights survived this time, prisoners suffered serious setbacks and we can be sure the whackos will be back for more next year. When first introduced by Ballasiotes 2010 contained numerous portions setting forth policy on the EFV program, banning wide ranges of written materials, etc. It also included issues dear to the Republican right, can't ban welfare, then let's prohibit welfare for any child conceived during an EFV. "Sorry kid, you need to starve because mommy/daddy is a prisoner and its your fault." It also imposed significant cuts on the DOC, including elimination of 20% of its management (from secretary of corrections down to lieutenant), eliminated the use of live instructors in prison education courses, etc. These provisions were stricken from the final version that passed. While the purported "reason" for this legislation is to cut prison costs, staffing makes up 72% of the operational costs of running a prison, yet anything designed to limit those labor costs never

made it into law. The token elements that did were vetoed. Readers should note that the Washington DOC employs over 6,100 people to hold some 11,000 prisoners captive. That 1 to 2 ratio is the second highest in the nation (only the federal Bureau of Prisons is higher). The real pork in prisons is, surprise, the pork. But you wouldn't know that from reading these laws. The key to cutting prison costs is to do what corporations the world over do: cut staffing, reduce wages and slash benefits. Because cutting costs isn't a real goal, that won't happen. Here's what Washington prisoners have to look forward to with 2010.

Indigence, Work and Education:

The legislature now defines prisoner indigence as a prisoner having less than \$10 on their account for thirty days prior to making a request for services. The DOC shall make a record of all services provided and note it as a debt to be collected whenever a prisoner's institutional account exceeds \$10. Readers should note that in *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991) the court found that an indigence level of \$46 a month was realistic when prisoners had to buy hygiene items as well as litigation materials. The law states that all prisoners should be required to participate in DOC approved education or work programs. Eligible prisoners who refuse to participate in those programs available for free (and there aren't many) will lose privileges. Prisoners who refuse to financially contribute to a work or education program will be placed in another one. Refusal to pay won't result in the loss of privileges. The DOC is instructed to establish objective medical standards to determine when a prisoner is mentally or physically unable to participate in work/education programs. The DOC is instructed to conduct an assessment of all prisoners' basic academic skill levels. Prisoners with less than an eighth grade academic level shall be placed in a combined education/work program.

Prisoners will be required to pay all or a portion of the costs and tuition associated with certain educational programs. The DOC is instructed to devise the payment formula, and base it on the prisoner's ability to pay. Prisoners will pay some of the costs associated with second and subsequent vocational programs associated with work programs and an AA or BA program if placement is made under subsection b of section 5. Prisoners

Anti-Prisoner Legislation(cont.)

will be forced to pay all costs associated with courses they enter independent of the DOC and vocational programs not associated with the prisoners' work. Prisoners serving life without parole sentences won't be required to participate in educational programming and cannot get more than one academic degree via a DOC educational program. Before the DOC builds or expands a prison it must adopt plans to use cable, closed circuit and satellite TV for education purposes. By December, 1996, the DOC must adopt a plan to reduce per pupil costs of instruction by "increasing the use of volunteer instructors and implementing technological efficiencies."

Earned Time and Paying for "Privileges":

RCW 72.09.130 concerning earned early release time is amended to include the loss of privileges within the prison, in addition to earned time. Prisoners won't receive earned early release days "during any time in which he or she refuses to participate in an available education or work program into which he or she has been placed under section 5 of this act." Prisoners will be provided with a copy of this new system by the DOC.

Prisoners will be required to contribute to the cost of "privileges." "The department shall establish standards by which inmates shall contribute a portion of the department's capital costs of providing privileges, including television cable access, extended family visitation, weight lifting and other recreational sports equipment and supplies. The standards shall also require inmates to contribute a significant portion of the department's operating costs directly associated with providing privileges, including staff and supplies. Inmate contributions may be in the form of individual user fees assessed against an inmate's institution account, deductions from an inmate's gross wages or gratuities, or inmates' collective contributions to the institutional welfare/betterment fund. The department shall make every effort to maximize individual inmate contributions to payment for privileges. The department shall not limit inmates' financial support for privileges to contributions from the institutional welfare/betterment fund."

Taking Prisoner Money:

Section 8 of the law states: "When an inmate receives any funds in addition to

his or her wages or gratuities, the additional funds shall be subject to the deductions in RCW 72.09.111(l)(a) and the priorities established in Chapter 72.11 RCW." This means that 35% of all money received by a prisoner will be seized by the DOC (20% goes to the DOC, 10% to a "savings account" to be given to the prisoner on release and 5% goes to the victim's compensation fund). This is in addition to any fines, restitution, child support, etc., a prisoner may already have. I have already filed suit on this portion of the law. *Wright v. Riveland* is pending in the US district court in Tacoma. I filed on June 20th and sought a TRO to halt enforcement of the law while the matter is litigated. As we go to press the case has been served and the TRO is awaiting a ruling. Readers will be advised of how it progresses. Anyone with questions on this should write to me directly.

Trailer Visits:

The legislature did almost nothing with regards to the EFV program. What seems to have happened is that the DOC adopted an EFV policy that did everything the legislature wanted done, in many respects it was harsher than the proposed legislation (see *PLN*, March, 1995). To prevent the DOC from pulling a fast one, the legislature now requires the DOC to notify the house and senate corrections committees of any proposed changes and allow the committee's input before the changes are made. So legislative micro-management of the DOC is now enshrined into law. I am sure that this has not ended the attack on the EFV program, instead they got their foot into the door and I'm sure will be back to kick the door in next year. In the meantime, prisoners at all close custody prisons (Walla Walla and Clallam Bay) have lost their EFVs, no prisoner married after January 10, 1995, can get them with their spouse, etc.

Weights, Censorship and TVs:

Weight lifting survived but now prisoners found to have committed an aggravated assault against another person will have their weight lifting privileges suspended for at least two years, at which point the warden must review the prisoner's infraction record and determine if an additional suspension should be imposed because the prisoner "poses a threat to the safety of others or the order of the facility." Another section states "Purchases of recreational equipment follow-

ing the effective date of this act shall be cost-effective and, to the extent possible, minimize an inmate's ability to substantially increase muscle mass. Dietary supplements made for the sole purpose of increasing muscle mass shall not be available for purchase by inmates unless prescribed by a physician for medical purposes or for inmates officially competing in department sanctioned competitive weight lifting."

Prisoners can't acquire or purchase a TV for at least sixty days after arriving at a prison from the intake and evaluation process at Shelton or Purdy.

Previous versions of 2010 were big on banning anything deemed to be "erotic" "violent" or "sexually explicit." This survived in a vague section 13 which instructs the DOC, in conjunction with the AG's office, to "adopt by rule a uniform policy that prohibits receipt or possession of anything that is determined to be contraband." Gee, and we thought the DOC mail and property policies, plus the whim and caprice of individual guards, already did this. Given the deletion of the previous language prisoners can probably expect new and still more repressive rules on mail and property as it looks like the DOC cut a deal on this one too.

Name Changes:

RCW 4.24.130 on name changes was amended. Prisoners seeking to change their name must give the DOC a copy of their application five days before entry of the order and if the name change is granted they will give the DOC a copy of the order within five days of entry, failure to do either will be a misdemeanor. Courts are instructed not to issue name change orders if it will "interfere with legitimate penological interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage." For a discussion on Washington prisoners' federal right to adopt another name see: *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994). Another section of the law states that prisoners who have a name change and do not use both their old name and new name to communicate with the DOC will be guilty of a misdemeanor.

Paying for Medical Care and Hygiene Items:

Washington prisoners will now be charged at least \$3.00 each time they seek access to medical care. The money will be taken from the prisoner's account and

sent to the state's general fund. The law states that "Offenders are required to make co-payments for initial health care visits that are offender initiated and, by rule adopted by the department, may be charged a co-payment for subsequent visits related to the medical condition which caused the initial visit. Offenders are not required to pay for emergency treatment or for visits initiated by health care staff or treatment of those conditions that constitute a serious health care need." Prisoners won't be refused care due to indigence and withdrawal of the co-payments won't take a prisoner's account below \$10. [The next issue of *PLN* will contain an article on legal challenges to this type of law and the idiocy of passing laws like this.]

The DOC will report to the legislature how many prisoners sought medical care, the amount of co-payments assessed, how many were paid, those not collected due to indigence and the number not assessed due to the serious, emergency need or being staff initiated. The first report is due no later than October 1, 1996.

Prisoners will be required to pay for all personal hygiene items now distributed by the DOC. While prisoners who are indigent won't be denied hygiene items, the law states that charges for both hygiene items and health care will become debts to be collected by the DOC. The Office of Financial Management is instructed to contract a private research company to review DOC health care services and delivery, to include whether prison health care should be privatized.

Alien Offender Camps and Work Camps:

Something that attracted no attention from the corporate media is the law's provisions for the "alien offender" camp. Generally countries that lock people up and segregate them into special prisons because of their race are denounced as racist, at a minimum. The DOC is ordered to create a camp for alien offenders and have it operational no later than January 1, 1997. In a letter to the legislature Governor Lowry states he is not vetoing this section of the law despite the fact that it applies to all alien offenders, whether documented or not and whether the offense they are incarcerated for will result in their deportation or not. The camp goals, to expedite deportation and reduce costs, are not questioned by Mr. Lowry. He states: "Of most importance, however, is the need to avoid any appearance that the State of Washington is sending an

anti-alien message generally. We have all seen the regrettable results of cost saving or efficiency measures escalating into issues of discrimination or even ethnic separation. I have been assured, however, that no such message should be read into the language of this section." He cites a letter from Ballasiotes to the effect that only "illegal" alien offenders will be considered for the camp.

Now, what can be read into the language of this alien offender camp? Its goals are: "(a) Expedited deportation of alien offenders; (b) reduced daily costs of incarceration, (c) enhanced public benefit through an emphasis on inmate work and exemption from education programs other than those programs necessary for offenders to understand and follow directions; (d) minimum access to privileges; and (e) maximized use of non-state resources for the costs of incarceration." Except for section (a), I can easily see the remaining criteria being used to establish Dachau in 1933. The original concentration camps set up by the British government in South Africa, Nazis in Germany, etc., did not have as their goal the killing of the prisoners. Everyone knows that the "alien offenders" that are going to be locked up in this camp will be almost entirely Hispanic with the bulk being from Mexico. A more accurate name would have been the "Mexican prison bill." Will they be forced to wear a yellow star too? Or perhaps a Mexican flag.

The terms needed to qualify for the "work ethic camp" were changed. Prisoners with sentences between 16 and 36 months can now participate and drug offenders are specifically allowed, while sex and violent offenders are still excluded (the distinction is made because under Washington law drug offenses are considered "violent.") Courts will now specify that prisoners will serve their post camp sentences in community custody until the entire sentence is completed.

More Government:

A new "joint committee on corrections cost efficiencies oversight" is established in the state legislature, this is in addition to the corrections committees in both houses. We need more government to "save money." This section expires July 1, 1997.

Studies in Slave Labor, Fences and Bunk Sharing:

The DOC is instructed to seek funding for incarcerating illegal aliens. These funds were recently appropriated by con-

gress in the 1994 crime bill (*PLN*, Dec. 1994). The DOC is instructed to seek enforcement of federal laws criminalizing alien reentry. The DOC should submit several reports to the legislature, including progress on the deportation of illegal aliens, reviewing the use of perimeter security designs that will minimize or eliminate the need for staffed guard towers at prisons (California recently implemented use of electrified fences). And, in what has to be the stupidest piece of legislation to come out of Olympia in two weeks, "The secretary shall review the feasibility and desirability of implementing a system to allow prison beds to be used on a rotational basis. The review shall include at least the following: (a) A fiscal analysis of the capital and operating costs of implementing a twelve hour scheduled rotation in which each prison cell and bed could be used by multiple inmates; and (b) an analysis of how the department would address safety issues that might arise from a rotation system that increases the amount of time inmates would spend out of their cells." Even prisoners at Aushwitz had their own bunk!

The correctional industries board of directors is instructed to review the possibility of expanding work programs in: recycling inorganic materials, redesigning and prefabrication of industrial products, data management services, industrial food services, construction and maintenance of adult and juvenile prisons in the state, building migrant worker housing using state and federal housing funds (could this be the agricultural interests of Eastern Washington state seeking to exploit prison slave labor to subsidize their exploitation of migrant farm labor?), horticulture specialty crops and, my favorite, "use of the Airway Heights prison kitchen to prepare kosher meals for correctional facilities inside and outside Washington state." The board will also review educational programs now available and see if they adequately prepare prisoners for slave labor jobs.

Probation:

RCW 9.95.210 is amended so that when courts suspend sentences they can order probationers to report to DOC designees rather than to the court. The state Law and Justice Advisory Council is instructed to propose standards for the supervision of misdemeanor probationers. Whenever a misdemeanor probationer is under DOC supervision the DOC may

Anti-Prisoner Legislation (cont.)

collect up to \$100 a month to help pay for the probationer's supervision.

Conclusion of 2010:

The last portions of the bill are interesting. Section 39 stated: "If specific funding for the purpose of this act, referencing this by bill number, is not provided by June 30, 1995, in the omnibus appropriations act, this act shall be null and void." Readers will note that this act, which purports to "save money" is going to require a lot of money to implement. Section 40 states "This act is necessary for the immediate preservation of the public peace, health or safety, or support of the state government and its existing public institutions, and shall take effect immediately."

Governor Lowry vetoed section 39 noting it was inconsistent with section 40. If something is necessary for the preservation of the public peace, health and safety "it cannot also be subject to the uncertainties of the appropriation process." Lowry signed the law on June 15, 1995, which is when it went into effect. Despite being an "emergency" it will take the DOC a while to implement the various provisions of the law.

Other Prison Laws:

Jail industries: HB 1929 passed unanimously in both houses. It amends RCW 36.110.130 to allow jails to enter into the slave labor business by contracting jail prisoners out to private sector business, industry and nonprofit groups. Also included, for the first time, is allowing jail detainees to produce goods directly for the county for sale to either the state, the county or private business, these are called "tax reduction industries." It requires businesses or counties using jail slave labor to have industrial insurance but doesn't allow the detainee to collect money for any injuries suffered until "discharged from custody." The law adds a section which purports to grant immunity from civil suit to all members of the state jail industries board if the act is performed in good faith. The law repeals RCW 36.110.040.

Looting the Inmate Betterment Fund:

HB 1136 amends RCW 7.68.090 and adds a new section to RCW 72.09. This law orders the DOC to transfer "twenty five percent of the total annual revenues and receipts received in each institutional

betterment fund subaccount to the department of labor and industries for the purpose of providing direct benefits to crime victims through the crime victims' compensation program as outlined in chapter 7.68 RCW. This transfer takes priority over any expenditure of betterment funds and shall be reflected on the monthly financial statements of each institution's betterment fund subaccount." The purpose of the inmate betterment fund has historically been to pay for recreation items for prisoners, such as sports equipment, dayroom supplies, EFV expenses, etc. There is little case law on challenging how betterment fund money is spent, historically it has operated as a warden's slush fund where prisoners have no voice in determining how or where the money is spent. But *Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994), *PLN*, March, 1995, recently discussed limits on DOC appropriation of betterment funds for purposes they were not intended for.

Criminalizing Infractions:

SB 5905 creates a new crime of "Persistent Prison Misbehavior." Realizing that with little good time left, many prisoners will soon lose whatever good time they have, leaving them with "nothing to lose," likewise for the many prisoners doing sentences of life without parole. The new statute states: "An inmate of a state correctional institution who is serving a sentence for an offense committed on or after August 1, 1995, commits the crime of persistent prison misbehavior if the inmate knowingly commits a serious infraction, that does not constitute a Class A or class B felony, after losing all potential earned early release time credit." This crime is classified as a class C felony and ranked at level 5 on the SRA's sentencing grid. Any convictions must be served consecutive to other sentences imposed. This law will create some interesting due process and administrative problems. While prisoners have no right to full due process in a disciplinary proceeding they do at a criminal trial. Does this mean the prosecutor must prove the disciplinary infraction was committed beyond a reasonable doubt? Given the time and expense involved in a criminal trial we'll see how often this law is invoked.

Criminal Laws:

The biggest change in criminal law was the passing of initiative 159, the "Hard Time for Armed Crime" initiative which will increase sentences involving weapons as well as expand the use of the

death penalty. For a detailed analysis of this law refer to the August, 1994, issue of *PLN*, copies are still available for \$1.00, or send a SASE for a copy of the individual article.

Drug Treatment: HB 1549 significantly amended RCW 9.94A.030 to allow defendants convicted of manufacturing, delivery or possession of Schedule 1 and 2 narcotics to be sentenced to a treatment oriented sentence, including electronic monitoring, home detention, etc.

Charging Misdemeanants: SB 5523 amended RCW 10.01.160 to allow judges to order defendants convicted of a misdemeanor to pay up to \$50 a day to pay for their "cost of incarceration."

DOC Imposes Sanctions: HB 1280 was passed into law, this amended RCW 9.94A.200 so that whenever a criminal defendant violates, or is accused of violating, any condition of his sentence the DOC, rather than a sentencing judge, can hold hearings and impose sentence for the violation. The DOC is now permitted to impose a wide variety of community sanctions as punishment for alleged violators, including electronic monitoring, jail time, home detention, work crews, etc. The DOC can only impose the punishment if the accused agrees to it and signs a stipulated agreement with the DOC. In the event no such agreement is reached, the case goes back to the trial court. The DOC must send copies of the stipulated agreements to the court and if the court isn't satisfied with the punishment imposed it can schedule a hearing and modify the DOC's sanctions.

Community Supervision: HB 1081 and SB 5065 modify RCW 9.94A.200 so that terms imposed on second or later sentences community supervision will begin with the first sentence and will be treated as violations of the community supervision sentence being served.

DOC Records: HB 1893 amended RCW 72.09.050 and added a new section to it. This added to the DOC Secretary's powers so that he/she can certify and maintain records within the DOC for court purposes. It authorizes the DOC to charge fees for the reproduction, transport, etc., of these records.

Restitution: HB 1047 modified RCW 9.94A.140 regarding restitution in criminal cases. It extends the time in which a restitution hearing may be scheduled by the trial court from 60 to 180 days. "The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total

amount.” Trial courts are now instructed to identify, in the sentence and judgment, the victim(s) entitled to restitution and the amount due each. Either the state or the victim can enforce the court ordered restitution “in the same manner as a judgment in a civil action.” Which means they need to go through a garnishment proceeding.

Sex Offender Registration: SB 5326 modified RCW 9A.44.130 concerning sex offender registration. It expands the requirements of those who must now register. Defendants found “not guilty by reason of insanity” and sex offenders under federal jurisdiction must now register as well. Likewise, sex offenders who move to Washington from other states or other countries must now register. A new section added to the statute states that whenever a sex offender registers with the county sheriff, the sheriff must make an attempt to verify that the registrant in fact resides at the address given. This includes sending certified letters and making visits to the registered sex offender.

Indigent Defense: HB 1237 added new sections and amended RCW 10.73 and 13.40.145 concerning state funded defense of the indigent. The law states “The legislature finds that it is appropriate to extend the right to counsel at state expense beyond constitutional requirements in certain limited circumstances to persons who are indigent...” The law states that counsel will be provided at state expense to indigent defendants so they can file appeals as a matter of right; respond to motions for discretionary review filed by the state; file a collateral attack on their conviction if they are under a sentence of death; are not sentenced to death and request counsel to prosecute a collateral attack on their conviction that has been found non-frivolous by the chief judge; to respond to a collateral attack by the state; to prosecute a motion for a petition for review in the state supreme or appeals court.

In another section, the law states that courts can require the parents of juvenile defendants to pay the costs of defense. Courts can also require defendants to pay the costs the state incurred in prosecuting or defending an attack by defendant on their criminal conviction or sentence. Costs that can be taxed against the defendant are those involving reproduction of the trial transcript (which usually costs thousands of dollars), clerk’s papers and fees for appellate counsel. The law states

that parties may petition the court for remission of the costs assessed if payment would constitute an undue hardship.

Jail Riots: HB 1117 amended RCW 9.94.010 so that criminal sanctions for rioting, hostage taking, drug and weapons possession that previously applied only to state prisoners now apply to those confined in county jails as well.

Self Defense: SB 5278 modified RCW 9A. 16.110 so that anyone found not guilty of a crime by reason of self defense can be reimbursed for their legal expenses by the state.

Criminal History: HB 1140 amends RCW 9.94A.60 regarding the use of criminal history in sentencing defendants. The main changes are moderating the “washout” period in which offenses can be used for sentencing purposes. The law now computes the time to include when the crime was committed, rather than when the conviction occurred. Federal convictions will now be scored as a comparable state offense, if the offense is exclusively federal it will be scored as a class C felony. Offenses committed in different counties or charged in different indictments will not be presumed to be the “same criminal conduct” for sentencing purposes. This means offender scores will be higher with a lesser likelihood of concurrent sentences being imposed. A new section allowing sentencing courts to impose above the guideline sentences is added. Courts can now rely on unscored misdemeanors and foreign criminal history.

Crime Victims: HB 1858 was passed, it creates the “office of crime victims advocacy” as part of the Department of Community, Trade and Economic Development. Its purpose is to assist communities in planning and implementing services for crime victims, advocating on their behalf and advise local and state government on policies and practices impacting crime victims. So much for reducing the role of government.

HB 1610 amends RCW 9.94A.080 which concerns plea bargains to include a section mandating that prosecutors “make reasonable efforts to inform the victim of the violent offense of the nature of and reasons for the plea agreement, including all offenses the prosecutor has agreed not to file, and ascertain any objections or comments the victim has to the plea agreement.” Prosecutors must tell the court, on the record, if the victim(s) expressed any objections to the plea agreement.

SB 5400 significantly amends several statutes relating to victim compensation. Under the new law, if a sentencing court does not enter a restitution order resulting in payments to the victim the DOC is ordered, within a year of sentence being imposed, to petition the court for entry of a restitution order. The DOC will be the party issuing notice of debt and the party served has thirty days to respond and request a superior court hearing.

In the October issue of *PLN* we will analyze the Washington DOC budget and spending authority. ■

IFP Dismissal Reversed

District courts reviewing a plaintiff’s petition to proceed *in forma pauperis* (IFP) must first review the complaints and decide whether they are legally or factually frivolous before they can demand partial payment of the filing fees. Bonnie McCaslin, a Nebraska state prisoner, filed nineteen lawsuits simultaneously and requested IFP status so as not to pay the filing fees.

The district court denied McCaslin IFP status based on her prison trust account statement for the past six months. McCaslin contested the amount and submitted her current trust statements. The court required her to pay \$53.75 per case as a filing fee. She asked the court to reconsider and accept that amount for all nineteen cases, which the court refused to do. The district court reviewed five of the cases, found them deficient and ordered McCaslin to amend them.

After McCaslin submitted amended complaints as ordered, the district court dismissed the five cases for failing to pay the partial filing fee. The court of appeals for the eighth circuit reversed and remanded.

“We have expressly stated that ‘the magistrate or district court judge should determine whether plaintiffs may proceed in forma pauperis in terms of whether the complaint was frivolous and warranted dismissal *before* ordering the plaintiffs to pay a partial filing fee.’” *In Re Funkhouser*, 873 F.2d 1076 (8th Cir. 1989). The court had previously held that requiring plaintiffs to first pay the fee then later dismiss the case as frivolous was neither contemplated nor allowed by the Federal Rules of Civil Procedure.

Anti-Prisoner Legislation (cont.)

The appeals court reversed and remanded the five cases back to the lower court with instructions to consider the complaints for frivolousness under 28 U.S.C. § 1915(d). Those claims not found to be frivolous would be within the lower court's discretion of whether or not reconsider the amount of the partial filing fee sought. See: *McCaslin v. First National Bank*, 43 F.3d 1182 (8th Cir. 1994)■

Qualified Immunity RA Defense

The court of appeals for the eighth circuit has held that the affirmative defense of qualified immunity is available to government officials sued under the Rehabilitation Act (RA), 29 U.S.C. § 794(a). McKinley Lue is a blind Missouri state prisoner who filed suit claiming he was given inadequate medical care and housing, denied employment and vocational training. Lue filed suit under 42 U.S.C. § 1983 seeking relief under the eighth amendment and the RA. The district court granted summary judgment to the defendants on the housing conditions claim. The medical claim went to trial where a jury ruled in the defendants' favor. The court denied summary judgment on qualified immunity grounds to the defendants on the RA claims and they appealed.

The court of appeals for the eighth circuit noted that individuals have a private right of action under the RA allowing them to seek money damages and injunctive relief. "We also conclude qualified immunity is available in Rehabilitation Act actions seeking damages from public officials. The Act does not expressly mention the defense, and neither the Supreme Court nor this circuit has addressed whether there is an implied qualified immunity defense in the Act. Four other courts of appeals, however, have applied the qualified immunity defense in lawsuits filed under the Rehabilitation Act."

Analyzing the policy considerations of granting public officials a qualified immunity defense, the court held it was appropriate for RA cases. Examining Lue's claims on the merits and for immunity purposes, the court held that the RA did not require prison officials to accom-

modate Lue in existing prison vocational programs because Lue never requested to participate in an existing class. The RA "does not require the invention of new programs designed for handicapped individuals." Nor does the RA require that handicapped individuals be given preferential treatment. Because none of Lue's allegations violate his rights under the Act the defendants were entitled to summary judgment on qualified immunity grounds. See: *Lue v. Moore*, 43 F.3d 1203 (8th Cir. 1994).■

Martinez Hearing Reversed

The tenth circuit has approved a process whereby district courts conduct hearings to develop the record and determine whether there is any legal or factual basis to claims brought by *pro se* prisoner litigants. See: *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978). In this ruling the court specifically outlines the district courts' duties and limitations when it conducts such hearings. Scott Janke, a Colorado prisoner, filed suit claiming that his due process rights were violated at a prison disciplinary hearing when he was not allowed to call witnesses or present documentary evidence at his hearing.

After filing the complaint the lower court scheduled a *Martinez* hearing. At the hearing the defendants called witnesses who testified about the disciplinary hearing in question. Their testimony sharply disagreed with the facts pleaded in Janke's complaint. After the hearing the magistrate recommended that the case be dismissed for failing to state a claim, which the district court did. The court of appeals for the tenth circuit reversed and remanded.

The appeals court held "It was entirely improper for the magistrate judge to rely on the hearing to resolve pertinent factual disputes. The *Martinez* hearing is a judicially recognized method of developing the record 'to ascertain whether there are any factual or legal bases for the prisoner's claims....' It is used as a tool to sort and clarify issues raised in a *pro se* complaint.... The hearing cannot, however, be used to resolve disputed factual issues.... It is improper to accept the prison officials' report of events at the hearing when they are in conflict with the pleadings."

"Furthermore, it was error to consider the merits of the complaint in determining whether Mr. Janke stated a claim for relief." When matters outside the pleadings are considered, such motions should be converted into summary judgment motions under Fed.R.Civ.P. 56. This requires that the plaintiff be given notice and an opportunity to respond. "Here, the magistrate judge used the hearing as an evidentiary proceeding, then rejected Mr. Janke's arguments. Under the Rule 12(b)(6) standard, this was error."

The appeals court held that these procedural errors by the district court required reversal. No opinion was expressed as to the merits of Janke's complaint. "Our ruling today is limited to a determination that it was error to dismiss Mr. Janke's complaint pursuant to Rule 12(b)(6)." See: *Janke v. Price*, 43 F.3d 1390 (10th Cir. 1994).■

INS Deportation Hearings Required Prior to Release

The Ninth U.S. Circuit Court of Appeals reversed and remanded a lower court decision that denied relief to an alien inmate convicted of an aggravated felony who claimed the Immigration and Naturalization Service (INS) was not taking steps to give him an expedited deportation hearing. The decision in *Garcia v. Taylor*, 40 F.3d 299 (9th Cir 1994), said that "when the government refuses to commence proceedings any earlier than four to six months before the release date, it is a foregone conclusion that the administrative appeals process cannot be completed in a timely fashion."

[For comparison, please see *Soler v. Scott*, 942 F.2d 597 (9th Cir. 1991); *Aguirre v. Meese*, 930 F.2d 1292 (7th Cir. 1991); *Prieto v. Gluch*, 913 F.2d 1159 (6th Cir. 1990); *Orozco v. US INS*, 911 F.2d 539 (11th Cir. 1990); *Gonzalez v. INS*, 867 F.2d 1108 (8th Cir. 1989).]

The Court said that it appears that the INS is deliberately ignoring Congress, which has tried to speed up the deportation process through changes in federal law. Requiring deportation hearings to be conducted during an inmate's federal incarceration means that the inmate will not be "holding over" in federal detention after his sentence is completed, and the requirement will save taxpayers' money

by reducing the number federal hold-overs.

Under the Immigration and Nationality Act, conviction of an aggravated felony is a ground for deportation. INS § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii). The statute requires the U.S. attorney general to "provide for the initiation and, to the extent possible, the completion of deportation proceedings, and any administrative appeals thereof, ... before [the alien is] release[d] from incarceration for the underlying aggravated felony." INA § 242A(d)(1), 8 U.S.C. § 1252(a)(d)(1).

In *Garcia*, the petitioner was serving an 84-month federal prison term for drug trafficking. He wanted to have his deportability decided and administrative appeals completed before his release date. When he was told that this would not occur, he sought a writ of mandamus directing prison officials and the INS to take the appropriate steps to commence his deportation hearing in a timely fashion. The district court had denied his petition because the INS does not have an officially stated policy of refusing to hold deportation hearings in such cases before a prisoner's release date. In its decision and order remanding the case, the Ninth Circuit said that the district court should inquire into whether the government has any intention of attempting to complete the administrative process before the petitioner's release date.

COMMENT: While federal budgetary constraints will have a big impact on the implementation of the court's position on this issue, it appears that the national mood has changed and that congressional intent will be carried out. Look for an increase in the number of immigration law judges to result in expedited deportation hearings in the future.

[This article was prepared by Boyd F. Campbell, an immigration law practitioner with the Montgomery, Alabama, law firm of Campbell Warner McBryar, L.L.C. Mr. Campbell is Chair of the Immigration Law Committee of the American Bar Association's General Practice Section.]

For further information, contact:

Campbell Warner McBryar
Attorneys and Counselors at Law
P.O. Box 230238
Montgomery
AL 36123-0238
(334) 272-7092

ID Rider Program Creates Liberty Interest

The ninth circuit has held that prisoners have a due process liberty interest in accurate and reliable rehabilitation reports. In 1972 Idaho created the "Rider Program" whereby convicted felons were sent to prison to be evaluated for potential release on probation, the sentencing court retained jurisdiction for a 120-180 day period. At the end of the retained jurisdiction period a Jurisdictional Review Committee (JRC) composed of prison officials, send a report and recommendation to the sentencing court with a recommendation to either release the prisoner on probation or cause the prisoner to serve the remainder of the original sentence. Idaho prisoners filed a class action suit claiming that prison officials did not give them an opportunity to meaningfully present their views at the hearings and to prepare for the JRC hearings. They sought declaratory, injunctive and monetary relief.

Prison staff prepare their report and recommendation and allow the prisoner to review it, but not keep a copy. Prisoners with a negative recommendation are immediately placed in segregation. Twenty four hours later the prisoner is brought before the JRC to rebut any information or recommendations. At the hearing the prisoner can call staff and prisoners as witnesses and make a written or oral rebuttal statement. The JRC then issues a final report which is forwarded to the sentencing court.

The prisoners claimed that their due process rights were violated because one day notice was insufficient to prepare an adequate rebuttal; they were not allowed to retain a copy of the report and recommendation when preparing their rebuttal; they were given inadequate explanation of negative evaluations prior to the rebuttal hearing and that because they are immediately segregated from the general prison population they cannot contact and call witnesses at the hearing.

The district court denied prison officials' motion for summary judgment, holding that prisoners have a protected liberty interest in a fair and accurate recommendation report. It also held prison officials were not entitled to qualified immunity because this right was well established as far back as 1979. Prison offi-

cials appealed and the ninth circuit appeals court affirmed.

The appeals court notes that states can create a due process liberty interest by "(1) establishing 'substantive predicates' to govern official decision-making, and (2) using 'explicitly mandatory language,' i.e. specific directives to the decision-maker that if the regulations' substantive predicates are present, a particular outcome must follow." The Idaho supreme court held in *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978) that the Rider Program created a due process liberty interest. Subsequent state court rulings have reaffirmed that holding. Thus, prisoners in the program have a right to a fair and accurate rehabilitation evaluation and report.

The court affirmed the denial of qualified immunity by noting that the numerous state court rulings should have left no doubt in prison officials' minds that prisoners were entitled to accurate rehabilitation reports. This right was clearly established by *Wolfe*. "An objective reasonable official would know that the procedures used at NICI denied the inmates their right to a reliable rehabilitation report. At the very least, a reasonable official would know that an inmate would not be able to adequately prepare for the rebuttal hearing or call witnesses at the hearing after being placed in segregation with no outside contact." See: *Browning v. Vernon*, 44 F.3d 818 (9th Cir. 1995). The Rider Program and its prison conditions are also discussed at length in *Browning v. Vernon*, 874 F. Supp 1112 (D ID 1994).■

Shackled Litigant Denied Due Process

The court of appeals for the second circuit has reaffirmed that trial courts deny pro se litigants a fair trial when litigants are shackled before the Jury and no hearing on the need for restraints is held. Ronald Davidson is a New York state prisoner who sued prison officials for reading his legal mail outside of his presence. The case went to trial and Davidson represented himself. Davidson arrived in court in leg irons, handcuffs, a waist chain and "black box" that prevented him from moving his arms. He requested that the restraints be removed in order for him to move his arms. The trial court refused, stating it was giving the escorting prison guards "carte

Shackling (cont.)

blanche" and would not "second guess" them. Davidson requested an evidentiary hearing on the need for restraints and the court refused.

The escorting guards told the trial court that Davidson had previously attempted to escape.

Davidson pointed out that he had been acquitted of the charges in a court of law and had sued over the matter and had court orders expunging all mention of the alleged escape attempt from his file. The court ultimately allowed the back and waist chain to be removed but not the handcuffs or leg irons. The jury returned a verdict in favor of the defendant prison officials.

The court of appeals for the second circuit reversed and remanded. The court examined the evidence that Davidson proffered, and sought to present to the lower court in an evidentiary hearing, concerning the alleged escape attempts. The court noted that in two published rulings courts had cleared Davidson of the attempted escape charges and had ordered all reference to the alleged attempts expunged from his prison files. Davidson also presented letters from the NY DOC commissioner acknowledging the expungement order and a memo from a prison warden stating he was not an escape risk.

The court gave an extensive discussion of the right of both prisoner litigants and criminal defendants not to be shackled during civil or criminal trials unless absolutely necessary. That is because all citizens have a right to a fair trial and shackling a party tends to create a negative impression on a jury which prejudices the shackled party.

In *Lemons v. Skidmore*, 985 F.2d 354 (7th Cir. 1993) the appeals court reversed a jury verdict in favor of prison officials where the prisoner litigant was shackled during the trial. The court in this case quoted extensively from *Lemons* and held that judges may not delegate the discretion to shackle a litigant to prison staff, who are usually the defendants in these cases. To do so is an abuse of discretion and violates the shackled party's right to due process and a fair trial.

If the trial court evaluates safety and security concerns on its own, takes steps to minimize the restraints and their prejudicial effects and gives cautionary instructions to the jury then there is likely no due process violation. See: *Woods v. Thieret*, 5 F.3d 244 (7th Cir. 1993) and

Holloway v. Alexander, 957 F.2d 529 (8th Cir. 1992).

"When the trial court has followed the proper procedures, its decision is reviewed for abuse of discretion. If the court has deferred entirely to those guarding the prisoner, however, it has failed to exercise its discretion.... If the reviewing court finds that the court has impermissibly delegated the decision to others or has otherwise abused its discretion, the error will not automatically lead to reversal, for harmless error analysis applies."

"In determining whether an unnecessary imposition of restraints was harmless, the reviewing court should weigh several factors, including the strength of the case in favor of the prevailing party and what effect the restraints might have had given the nature of the issues and evidence involved in the trial. Where the restraints would appear to be pertinent to the substance of the plaintiff's claims, the error may well not be harmless."

The court concluded the error was not harmless in this case because the court impermissibly delegated its discretion on the shackling to the prison guards escorting Davidson, then the court denied Davidson's motion for an evidentiary hearing on the matter. These errors were compounded by the fact that the trial court made no effort to minimize the prejudicial effects of the restraints. The trial court did not issue any cautionary instructions to the jurors to disregard the restraints when they considered the merits of the case. The appeals court expressed concern at the spectacle Davidson presented in court, attempting to handle his legal papers while handcuffed and hobbling around the jury box to conduct *voir dire* while in leg irons. The court held that the trial court should have modified its normal courtroom procedure to avoid this situation.

The appeals court gave instructions for the trial court, on remand, to hold an evidentiary hearing to determine what restraints, if any, were necessary for Davidson. The lower court was forbidden to consider the materials ordered expunged by the state courts. The lower court was instructed to take steps to minimize the potentially prejudicial effects of any restraints that it did consider necessary. The case was remanded for a new trial on the merits. See: *Davidson v. Riley*, 44 F.3d 1118 (2nd Cir. 1995). The same case is reported again at *Davidson v. Riley*, 45 F.3d 625 (2nd Cir. 1995). ■

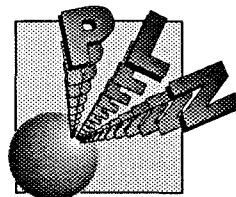
8th Amendment Discussed

In a lengthy ruling a district court in Iowa gave an extensive discussion of the history of the eighth amendment and numerous cases regarding its application to medical neglect cases. This case is useful not so much for the facts or issues presented in the underlying case but because of the extensive cases cited that provide a valuable starting point for anyone researching eighth amendment medical claims.

Robert Starbeck filed suit claiming that Iowa prison officials and Linn County (Cedar Rapids) jail officials violated his eighth amendment rights by denying him corrective surgery to repair a back injury, as recommended by his treating physicians. He also claimed that use of a "black box" when transporting him to and from medical appointments violated his eighth amendment rights by causing pain and discomfort.

The district court dismissed the black box claim, noting that the issue has been ruled on by several circuit courts which have held it does not violate the eighth amendment. The court held that delaying surgery for a medical injury violates the eighth amendment. This claim was set for trial.

In its lengthy legal analysis the court identifies the legal burdens faced by the plaintiff and defendant in eighth amendment medical cases and gives an overview on the history and meaning of the eighth amendment. It also discusses the objective and subjective components that a plaintiff must plead and prove in order to prevail on such claims. The court cites numerous cases, from all circuits, where courts have found an eighth amendment violation where prison officials have failed, refused or otherwise inadequately treated a wide range of prisoners' medical ailments. This case provides a good explanation and research starting point for those interested in, or litigating, this issue. See: *Starbeck v. Linn County Jail*, 871 F. Supp. 1129 (ND IA 1994). ■



Detainees Entitled to Non-Punitive Conditions

Pretrial detainees, who have not been convicted of any crimes, may not be punished in any manner. This includes housing them in jail conditions that could be construed as punitive. Dale Miller filed suit over conditions at the Cook County (Chicago) Jail. He claimed that jail cells lacked adequate ventilation and heating, the showers were filthy and he was given a wet mattress infested with insects and mice. He also sued over jail policy of refusing to pay postage for more than the first ounce of letters. The defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted.

The district court gave an extensive analysis of the legal principle which holds that pretrial detainees may not be punished under any circumstances. Detainees retain as many rights as convicted prisoners. "If the detainee has 'at least' as much protection, this leaves open the argument that he can have more. That would explain why the Eighth Amendment cases relied on in *Salazar* and *Swafford* are useful by analogy.... When the challenged conditions amount to cruel and unusual punishment under the Eighth Amendment, they 'obviously' violate the Fourteenth Amendment rights of pretrial detainees. But those are the easy cases. Miller's claims regarding inadequate heat and ventilation fall into this category. The Seventh Circuit has held that adequate heating and ventilation are fundamental attributes of shelter that corrections officials must provide under the Eighth Amendment."

Regarding Miller's claim about the wet mattress, "This court fails to see how having a pretrial detainee sleep in a flooded area on a wet mattress infested with insects and mice furthers any legitimate governmental interest in maintaining the detention facility." The court held it was inappropriate to dismiss these claims at this early stage of the proceedings.

The court held that Miller had adequately stated a claim that he was denied due process when he was placed in segregation in the jail and was not allowed to call witnesses at the disciplinary hearing nor was he given 24 hour notice prior to the hearing. These allegations stated a violation of *Wolff v. McDonnell*, 418 US

539, 94 S.Ct. 2963 (1974). Miller had also stated a claim against Cook County officials by claiming that this was a widespread practice which had the effect of policy and custom. Miller also stated a due process claim with regards to being beaten by two unknown guards while another guard watched.

The court dismissed the claim regarding the jail policy of not paying the postage on legal correspondence weighing more than one ounce. The court based its dismissal on the fact that Miller could show no actual harm or prejudice resulting from the policy. See: *Miller v. Fairman*, 872 F. Supp. 498 (ND IL 1994).■

Outgoing Mail Censorship Illegal

A district court has reaffirmed the long-standing principle that the censorship of outgoing prisoner mail rarely implicates prison security interests. Donald Gee, a Wyoming state prisoner, wrote a letter to his brother about his conditions of confinement, that he was being retaliated against by prison officials and that he might die because he was being denied medication. Wyoming prison officials routinely censor outgoing prisoner mail and they confiscated Gee's letter and inflected him. Gee was charged with violating a prison rule prohibiting "providing false information to any official, court, news media, penitentiary employee, or the general public." He was found guilty of the charge and punished.

Gee filed suit claiming that the censorship and discipline violated his first amendment rights as stated in *Procunier v. Martinez*, 416 US 396, 94 S.Ct. 1800 (1974). "As was the case in *Martinez*, defendants in this case do not show how statements directed *outside* of the prison, can undermine or pose a threat to order, discipline and security inside of the institution. Similarly, defendants do not specify what contribution the suppression of false statements by an inmate to his family about the motives or conduct of prison officials may make to the rehabilitation of criminals."

Prison officials must show "how the regulation or practice used as a basis for censoring plaintiffs outgoing mail 'furthers an important or substantial governmental interest unrelated to the suppression of expression...' It is not enough to simply recite the important government

objectives of 'security, order and rehabilitation.' Once suppression of the communication is established, defendants must make a showing of how the communication directed outside the prison threatens 'security and order' in the penitentiary in order to show that they have not violated a right clearly established at the time of their action."

The court held that Gee had established a factual issue requiring a trial to resolve as to whether prison officials censored his letter to eliminate unflattering comments which would violate the clearly established law of *Martinez*. The court held that prison officials were not entitled to qualified immunity for their actions because the rights allegedly violated were well established at the time.

Despite finding that the application of the Wyoming Penitentiary mail rules may lead to first amendment violations, the court held that the rules themselves, as written, pass constitutional muster. The court held that the general regulation prohibiting prisoners from providing false information "was unconstitutionally vague as applied." "Thus, because a person of ordinary intelligence would not necessarily guess that 'general public' includes members of his immediate family, the court must deny defendant's motion for summary judgment on the issue of the alleged vagueness of Ch. XXX, § 2, Para. 27, as applied as a basis for censoring outgoing mail to an inmate's immediate family." The case was set for trial. Readers will note that there is extensive case law from most circuits holding unlawful any discipline of prisoners based on statements or comments made in outgoing mail which involves criticism of prison officials, etc. See: *Gee v. Ruettgers*, 872 F. Supp. 915 (D WY 1994).■

Translators Required for Medical Interviews

Pretrial detainees and convicted prisoners held in the Kern County, CA jail filed a class action suit challenging the jail's use of padded safety cells for violent and suicidal prisoners and other jail conditions. The district court held that the "safety cells," consisting of bare cells with no furniture and only a grate covered pit toilet, violate no constitutional guarantees. The court issued an injunction requiring prison officials to develop a policy allowing prisoners in administra-

tive segregation to exercise and have day room access together; and it requires jail officials to provide non-inmate translators for Spanish speaking prisoners seeking medical care. Both parties appealed and the court of appeals for the ninth circuit affirmed in part, reversed and remanded in part.

The appeals court affirmed the lower court ruling with regard to the "safety cells." The court held that use of the cells for short periods of time to protect suicidal prisoners was acceptable and did not violate the eighth amendment.

The court reversed the injunction regarding exercise for prisoners in administrative segregation (ad seg). Prisoners in ad seg retain all jail privileges such as visitation, phone access and exercise. However, they are held alone and have no contact with other prisoners for any reason. At trial the prisoners presented evidence that the isolation has adverse effects on them. The appeals court noted that in past rulings it held that administrative segregation, "even in a single cell for twenty three hours a day, is within the terms of confinement ordinarily contemplated by a sentence." Noting that the relief ordered by the court was "extremely reasonable and deferential to prison officials" the appeals court reversed it by holding that the conditions complained of did not rise to the level of an eighth amendment violation.

Jail officials objected to the lower court order requiring that they provide non prisoner translators for Spanish speaking prisoners during medical interviews. The court noted that this issue has not been previously addressed by the ninth circuit. However, in *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) that court stated that failure to provide translators can constitute deliberate indifference to prisoners' serious medical needs. "An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of alleviation, can contribute to unconstitutional deficiencies in medical care."

The court affirmed the injunction which required "that a non-inmate translator, preferably a member of the medical staff, be made available upon an inmate's request." The injunction was consistent with a jail policy requiring a medical staff

member to translate and a security staff member to translate if medical staff was not available. See: *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995).■

No Immunity for Smoke Exposure

The Court of Appeals for the Eighth Circuit has affirmed a lower court ruling denying prison officials qualified immunity from money damages for exposing a prisoner to Environmental Tobacco Smoke (ETS). George Weaver, a Nebraska state prisoner, was placed in a cell with a heavy smoker. He complained to prison officials that when he is celled with a smoker he suffers from severe medical problems such as headaches, nausea, vomiting and breathing difficulties. He was told to file a grievance, which he did. The warden responded by ordering Weaver's cell to be designated a "non-smoking" cell. Despite this designation Weaver's cellmate continued to smoke and prison officials confirmed this. Weaver personally showed the warden's orders to prison officials and they made no attempt to enforce the orders.

Weaver filed another grievance and the Director of Correctional Services responded by reiterating that Weaver's cell was non smoking and that if he continued to experience problems he should contact unit staff or an investigation or a cell change. Weaver contacted unit staff, advised them that his cellmate was still smoking and asked that he or his cellmate be moved to a different cell. Unit staff refused to make any cell changes and told Weaver they didn't care what happened to him and were not there to "baby-sit" prisoners. Weaver asked to see a doctor, explained his medical problems and the doctor ordered a cell change which was done immediately.

Weaver then filed suit under 42 U.S.C. § 1983 claiming that prison officials had violated his eighth amendment rights by forcibly housing him with a smoker. The defendants filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. They also claimed they were entitled to qualified immunity for their actions. The district court denied both motions. The court held that *Helling v. McKinney* 113 S.Ct. 2475 (1993) [See *PLN*, Vol. 4, No. 9] clearly established prisoners' right to be free from exposure

to second hand smoke (i.e ETS). The defendants appealed and the court of appeals for the eighth circuit affirmed the lower court and remanded the case for trial to determine liability and award damages.

The appeals court noted that on appeal it reviews a 12(b)(6) motion *de novo* and views the complaint in the light most favorable to the non-moving party. Because qualified immunity is an affirmative defense, it will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint. The court notes that prisoners have an eighth amendment right to receive adequate medical care. The eighth amendment also imposes a duty on prison officials to provide humane conditions of confinement. "In this context, a prison official violates the Eighth Amendment by being deliberately indifferent *either* to a prisoner's *existing* serious medical needs or to conditions posing a substantial risk of serious future harm. Compare *Estelle v. Gamble*, 429 US 90, 104, 97 S.Ct. 285, 291 (1976) (existing medical needs) with *Helling*, 113 S.Ct. at 2481 (risk of future harm to health)."

The court held that the lower court should not have relied on *Helling* in this case because Weaver was not complaining about future harm to his health but harm to his existing medical condition. Prison officials claimed that the complaint did not allege they were deliberately indifferent to Weaver's serious medical needs. "We disagree. Viewed in a light most favorable to Weaver, the complaint portrays the prison officials as consistently unwilling to enforce the smoking ban in Weaver's room and repeatedly unresponsive to any of Weaver's requests and protests. We conclude that Weaver has alleged deliberate indifference to his existing serious medical needs and thus has alleged the violation of a constitutional right."

Even though the appeals court held this case was not governed by *Helling* it ruled that the lower court had reached the correct conclusion in denying prison officials qualified immunity for their actions. "... Weaver's claim is one of deliberate indifference to his existing serious medical needs. Such claims were first recognized by the Supreme Court almost two decades ago. See *Estelle v. Gamble*,... *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993). Weaver has alleged the violation of a clearly-established right." See:

Weaver v. Clarke, 45 F.3d 1253 (8th Cir. 1995).

Previous issues of *PLN* have reported on smoking bans in the Texas and Michigan prison systems. That was foreseen as an obvious result when the supreme court issued its ruling in *Helling*. As this and other findings of liability are issued, holding prison officials liable for exposing prisoners to ETS it is likely that the trend towards non-smoking prisons will accelerate. This is in the context that most of society has already concluded that the health risks associated with exposing people to known carcinogens, ETS, are unacceptable. ■

Hearing No Substitute for Trial

The court of appeals for the eighth circuit has held that a district court evidentiary hearing cannot serve as a substitute for a full trial, doing so violates a prisoner's seventh amendment right to a jury trial. Harold Hobbs, an Arkansas state prisoner, was held in solitary confinement under orders not to have any contact with other prisoners. While Hobbs was outside of his cell a prison guard opened the cell door of another prisoner, who rushed out of his cell armed with a knife and attempted to stab Hobbs. Hobbs fled and was able to escape the other prisoner. He reported to work but later suffered chest pains and emotional distress. Hobbs filed suit pursuant to 42 U.S.C. § 1983 claiming that several prison guards had violated his eighth amendment right to remain free from attack by other prisoners. He sought injunctive relief, compensatory and punitive damages.

After surviving the defendant's motion to dismiss the magistrate judge scheduled the case for a "pre jury hearing" pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) and directed Hobbs to file a witness list, motion for issuance of subpoenas and summaries of the witnesses' proposed testimony. The defendants did not file any responsive pleading to the court's order. At the conclusion of the testimony at the hearing the magistrate recommended dismissal of the suit, holding that Hobbs had failed to state an eighth amendment claim because he had not suffered a substantial injury and because the attack was isolated and spontaneous. Hobbs filed objections to the

recommendation and specifically renewed his request for a jury trial. The district court adopted the magistrate's recommendation and dismissed the suit.

Hobbs appealed and the eighth circuit court of appeals reversed and remanded for a trial. The court held that the hearing conducted in this case was not a *Spears* hearing, used to determine whether a complaint is legally frivolous pursuant to 28 U.S.C. § 1915(d). In this case leave to proceed in forma pauperis had already been granted and process had been issued and served. The court noted that the magistrate did not consider revoking Hobbs' indigent status nor recommend dismissal of the suit as frivolous. The court noted that the hearing was not held as a Rule 12(b)(6) motion for failing to state a claim upon which relief could be granted nor as a summary judgment motion hearing.

While a court may grant summary judgment to a party on its own motion, "...the party against whom judgment will be entered must be given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." In this case, the court's scheduling order was not sufficient to apprise the parties of the magistrate's intention to grant summary judgment if Hobbs failed to adequately oppose such action. The citation of *Spears* "would have indicated only that the magistrate judge intended to determine whether the claims were frivolous, an issue which, as noted above, had already been resolved in plaintiff's favor."

Because the defendants' motion to dismiss had already been denied the case was not suitable for disposition via summary judgment. The appeals court characterized the hearing as being akin to a motion for a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) even though none of the parties or the lower court called it such. The court noted that in *Johnson v. Bi-State Justice Center*, 12 F.3d 133 (8th Cir 1993) [See *PLN*, Vol. 5, No. 6] it had approved use of a pretrial evidentiary hearing to determine whether a prisoner's non-frivolous § 1983 damages claims warrant a jury trial. But, the court has stressed that such hearings must be consistent with the plaintiff's right to a jury trial. The standard at such hearings is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law."

In this case the appeals court cautioned "Although we have approved the use of this process, which does not conform to the Federal Rules of Civil Procedure, we repeat our admonition that it must be used cautiously and advise that, at least in the view of this panel, the better practice would be to abandon its use entirely."

Reaching the merits of the case, the court held that the district court had erred in granting what amounted to a directed verdict to the defendants, in effect denying Hobbs his right to a jury trial. Because both parties presented evidence at the hearing the court held that the issue of credibility was at stake and should be resolved by a jury at trial.

The defendants argued that even if the hearing was irregular, they were still entitled to judgment because Hobbs had not shown a cognizable injury as a result of the attack. The court disagreed. "We cannot conclude that plaintiff's emotional distress was not an injury serious enough to be constitutionally cognizable." "Whether the attack was spontaneous and isolated was not fatal to plaintiff's claim that defendants acted with deliberate indifference to or in reckless disregard of his right to be free from violent attacks by other inmates. The issue was whether plaintiff faced a pervasive risk of harm (and whether defendants failed to reasonably respond to that risk)." See: *Hobbs v. Lockhart*, 46 F.3d 864 (8th Cir. 1995). ■

OR DOC To Ban Smoking

The Oregon DOC has announced plans to ban smoking in all its facilities by October 1, 1995. The ban will be implemented in a four phase plan which gradually limits, then eliminates, the areas in which prisoners may smoke. The DOC will offer smokers educational material and classes on how to quit smoking before then. A Kansas reader has reported that the DOC in that state has also announced plans to ban smoking.

Both of the readers who submitted the above information have indicated they will be undertaking litigation against the smoking ban. There are several published cases where prisoners have challenged bans on smoking, all have lost as the courts hold that prisoners have no constitutional right to smoke. Whether or not state courts might hold differently is a possibility but a slim one.

OR Smoking Ban (cont.)

In the September, 1993, issue of *PLN* we reported the Supreme Court ruling in *Helling v. McKinney* which held that prison officials were liable for exposing non smoking prisoners to Environmental Tobacco Smoke (ETS). At that time we predicted that it was only a matter of time before all or most prisons across the country went non-smoking. While it is possible to have non-smoking units, prison-crats as a general rule dislike any inconvenience or having to follow any laws such as segregating smokers from non-smokers. These are the driving factors in the prison smoking bans, not concern for prisoners' long term health, the additional health care costs imposed by allowing prisoners to smoke or the risk of exposing non-smoking prisoners to known carcinogens.

In the July, 1992, issue of *PLN* we reported the fact that the Vermont DOC had rescinded its ban on smoking. That ban lasted six months and was ended after prison officials realized they could not control the flow of contraband cigarettes into prison (mainly by staff) which led to a massive black market of \$5 cigarettes. The Texas DOC banned smoking March 1, 1995. We'll see how long the bans last. ■

Fear Constitutes "Actual Injury"

A district court in Illinois has held that the fear a prisoner experiences when attacked by another prisoner, in the absence of any physical injury, is sufficient injury to state a claim for compensatory damages under § 1983. Anthony Jones is an Illinois state prisoner in protective custody. He claimed that he gave a prison guard a note not to open his cell door for any reason because other prisoners were trying to sexually assault him. Later that morning the guard opened Jones's cell door and a prisoner charged in brandishing a knife. Jones suffered no physical injury during the attack. Jones filed suit under § 1983 claiming that the guard had violated his eighth amendment right to protection from assaults by other prisoners.

The guard denied that Jones had informed him of any danger or need for additional protection. The court held that

this created a disputed issue of material fact which needed to be resolved at trial. The court held that Jones had produced sufficient evidence to meet the objective and subjective components of his eighth amendment claim and should proceed to trial.

The prison guard sought dismissal on the basis that Jones had not alleged any actual physical injury or emotional distress. *Benson v. Cady*, 761 F.2d 335 (7th Cir. 1985), *Niehaus v. Liberio*, 973 F.2d 526 (7th Cir. 1992) and several other seventh circuit cases have held that absent

injury plaintiffs have no cause of action under § 1983. The court distinguished this cases by noting "We believe that Jones has presented sufficient evidence of his fear and alarm at being attacked to satisfy the actual injury requirement of § 1983. See *Memphis Community School District v. Stachura*, 477 US 299, 307, 106 S.Ct. 2537, 2543 (1986) noting that mental and emotional stress constitute compensable injuries under § 1983." See: *Jones v. Banks*, 878 F. Supp. 107 (ND ILL 1995). ■

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. Readers may recall that in the July, 1994, issue we ran an article concerning the suit filed by Ed Mead (*PLN*'s former co-editor) and myself against the Washington state parole board. After being released from prison in 1993 the parole board placed a parole condition on Ed whereby he was forbidden from having any contact with convicted felons, namely the bulk of *PLN*'s readers and myself. The Washington ACLU took the case and filed suit on our behalf in federal court in Tacoma. Our attorney, Frank Cuthbertson, did an excellent job arguing our case that the parole board's ban was in retaliation for the critical articles published in *PLN* and operated as a prior restraint on the press and violated our right to free speech. Evidence supporting this was the fact that Ed's federal parole officer construed a similar no contact condition to forbid only actual physical contact, letters and phone calls were okay. Likewise, Ed's state parole officers repeatedly questioned him about his involvement with *PLN* and made it clear that the purpose of the restriction was to prevent his involvement in *PLN*.

In May, 1995, Judge Bryan issued an unpublished ruling that upheld the restriction and dismissed the suit. The court ignored our first amendment and free speech argument and circuit law that parolees have more rights than prisoners and focused on the no contact order. The court relied on *Turner v. Safley* to hold that if prisons can prevent prisoners from having contact with each other then the parole board can prevent felons from having contact with each other. Needless to say, this is a bad ruling which reaffirms the principle that speech may be free but

it's not cheap. So if you're ever asked to name the countries you go to prison for editing a magazine remember to include the U.S. We are appealing the case to the ninth circuit.

In early June the *Seattle Times* did a front page piece on *PLN*. Dan and I were surprised the article turned out as well as it did. The reporter, Barbara Serrano, did not engage in any prisoner bashing as we had feared. Until now *PLN* had been largely ignored by the corporate media, we went about our business and they went about theirs. We received about a dozen or so inquiries from *Times* readers asking for a sample copy of *PLN*.

In our article submissions box we request articles and news items from our readers. This doesn't mean that we want fake or bogus stuff. In over five years of publishing we are proud of the fact that we've never knowingly published something that was wrong or incorrect, factwise anyway. Larry Chambers, a federal prisoner at Leavenworth, sent us a bogus court order purporting to be issued by a federal judge in Detroit. On it's face the order looked real enough and had the judge-making racist statements. As is our usual practice, we wrote to confirm the veracity of the order. It turns out the order was faked, the judge sent an affidavit to the effect that he had never issued such an order and the case number was also bogus and the matter had been referred to the US attorney's office for investigation, turns out Chambers sent copies of the same bogus order to numerous other media outlets. The point I'm making is please don't waste our time with fake and bogus information. Beyond wasting scarce time and resources is the fact that it has the potential of damaging our credibility as a

source of reliable information. We've worked hard so that "I read it in *PLN*" means something. Chambers isn't a *PLN* subscriber.

In last month's editorial Dan got after prisoners who send only the subscription card with "indigent prisoner rate" marked and don't send any donation or even a letter. The flip side of that is attorneys who only subscribe at the individual rate and not at the institutional rate. It is the institutional subscriptions that subsidize our indigent readership in control units and on death row.

We operate on the concept of "from each according to his abilities..." as a general rule legal professionals are better able to afford donations of \$35 or even higher than prisoners. When attorney subscriptions expire we are sending them an invoice asking them to upgrade to an institutional subscription. So if you're a lawyer and can afford it, please upgrade your subscription. No one at *PLN* gets a salary and with more of your clients getting locked up, *PLN* needs to get around more. Given the outrageous prices most legal publications charge we think ours are quite reasonable. In five years of publishing the only lawyer who has donated more than the \$35 for an annual subscription is Dan Manville who has donated \$200 (the hall of shame award goes to Laners and Scales, the Seattle law firm who sent a donation of \$5 at the time they held a \$180,000 DOC legal services contract).

We frequently get inquiries about reprinting articles from *PLN*. We are anti copyright as long as our materials are published in non profit publications and we are cited as the source of the material. Lately there has been a spate of articles being plagiarized from *PLN* (the worst was the Alabama reader who took a large portion of one of my articles and resubmitted it to *PLN* as an original submission!) While imitation may be the sincerest form of flattery outright plagiarism is an indication of intellectual bankruptcy.

Anyone wanting copies of the December, 1993, March, April, June, July, Aug., Sep, Dec., 1994 issues and all of 1995 issues of *PLN* should send \$1 each while supplies last. Full sets are available at \$35 per year. Enjoy this issue of *PLN* and pass sit along to others when you're done with it. ■

Police, Death, and Inquests

by Adrian Lomax

David Urban, 35 years old, was serving a 30-day sentence in the Winnebago County Jail in Oshkosh, Wisconsin, when, at 1:00 pm on January 13, he began complaining to guards that he felt ill and needed medical attention. The sheriff's deputies who run the jail thought Urban was faking. Twenty hours later Urban died of a heart attack.

"I wish someone would have believed him," said Urban's girlfriend, Vanessa Miller, afterwards. Urban phoned Miller several times during the afternoon and evening of January 13. Miller testified before an inquest jury that Urban told her, in a call at about 11:00 pm, that he felt like his chest was caving in. In another call Urban was screaming, saying "I feel like I'm dying. All they've done is take my blood pressure and pulse." Patty Strassen, a clerk at the jail, testified that on his last afternoon alive Urban was vomiting, grabbing his stomach and chest and talking to himself, saying "My God, I'm sick. Someone help me." Yet jail personnel failed to summon adequate medical attention and Urban was declared dead the next morning.

There is nothing unusual in all this. Anyone who's done time in jail or prison in this country knows that the standard response to inmates who complain of illness is to ignore them. Imagine being locked in a cell, feeling your chest "caving in," pleading for medical attention, and having the deputies tell you to shut up. David Urban lived that horror, and died in horror.

Make no mistake, the police killed David Urban. Because he was locked in a jail cell, Urban was deprived of any ability to obtain medical attention on his own. By ignoring Urban's cries for help as he died, the Winnebago County sheriff's deputies murdered Urban as surely as if they'd shot him in the head.

In spite of these shocking facts, the inquest jury decided that none of the deputies should face criminal charges. There is nothing unusual in that either. Law enforcement personnel are almost never held responsible for prisoner deaths, regardless the circumstances. The inquest procedure is one big reason why.

District attorneys say the reason they order inquest proceedings in cases where

police cause a death is to determine whether any criminal wrongdoing took place. Funny thing, DA's rarely find it necessary to rely on inquest Juries to determine whether so-called street criminals should be prosecuted. For most people suspected of crimes, DA's decide by themselves whether to press charges.

The real reason district attorneys call for inquests when police kill is to insulate the cops from criminal liability. DA's protect killer cops because having police mad at them makes it harder for DA's to prosecute the more stereotypical criminals. At the same time, DA's have to stand before the voters for re-election, so they don't want to take the heat for brazenly covering up police crimes.

When police kill someone the DA calls for an inquest, does a half-hearted job of presenting the case against the cops, and lets the jury decide. If the inquest jury says the cops shouldn't be charged, everyone's happy, except the many victims. The cops get off scot-free and the DA can deflect criticism, saying it was the jury's decision to let the cops walk. If the inquest jury finds that the police broke the law, the real duplicity of the inquest procedure shines through. The decisions of inquest juries are advisory, not binding. DA's don't have to follow them. A district attorney can ultimately decide not to file charges anyway.

A bill now before the Wisconsin state Senate would make the killing of a police officer punishable by execution. Yet, when police kill citizens, the legal system oozes with excuses why the police should not be punished at all. The inquest procedure is a major component in this obscene double standard. It must be abandoned. When law enforcement personnel are involved in deaths, district attorneys should do the job they were elected for. Let the DA's decide up or down whether the police should be prosecuted, just as they do with other criminals. And let the DA's suffer the consequences on election day if they cover for killer cops. No more hiding behind the legal sham of an inquest jury to protect murderous police. ■

News in Brief:

Canada: On May 10, 1995, a government panel investigating why more than 11,000 Canadians, most of them hemophiliacs, contracted AIDS and hepatitis in the 1980's, announced that it had traced the illness to blood products made with



blood from Arkansas state prisoners, many of whom later tested positive for the HIV virus. The Canadian government owned Connaught Laboratories purchased large quantities of blood from American prison systems in the 1980's.

AZ: Maricopa County sheriff Joe Arpaio is notorious around the country for his punitive treatment of jail detainees, which includes canceling coffee, smoking, sexually explicit magazines, housing prisoners in tents, etc., at the jail. Arpaio's latest stunt has been to spend \$150 from the jail's canteen fund to buy Newt Gingrich's ten part video lecture series. The series will be piped into the detainees' cells via a cable TV system he installed. The series deals with democracy (what does Newt know about this?) and free enterprise (does he talk about his book deals?).

TX: At a June 11, 1995, National Sheriff's Association (NSA) convention US attorney general Janet Reno announced that the Department of Justice will give the NSA, in conjunction with the American Correctional Association (ACA), a \$150,000 grant to provide state and local jails with educational and skill building television programming, a move that could replace normal cable and broadcast television. The programming will be in subjects such as alcohol and drug abuse, parenting skills, anger management, etc. Initially eight ACA and NSA representatives will form an advisory board who will select eight prisons to be used as part of a pilot project on replacement TV programming. Who knows, they might take some hints from Sheriff Arpaio.

Rwanda: The government has announced it will no longer arrest any but the most serious suspects in last year's ethnic massacres. The nations prisons, built to hold 5,000 prisoners, have held more than 35,000 since July, 1994. In March, 1995, 74 prisoners were jammed into a small cell in the Kigali jail when 24 suffocated. The majority of the prisoners are suspected of taking part in the 1994 massacres that left more than 500,000 people dead. The International Committee of the Red Cross has announced it will pay to build a 5,000 person prison to help alleviate the overcrowding crisis in Rwanda. The Red Cross said many of the detainees are held while the judicial system has collapsed and is unable to administer justice, release the innocent, etc.

Other UN Organizations will assist in building temporary prisons.

FL: Jerry Melvin, a Republican state representative has introduced legislation requiring prisoners to pay up to \$60 a day for their incarceration. This is proof that bad ideas never die. A 1979 Florida law requiring similar payments was found unconstitutional by a federal court. The program spent \$89,000 to collect \$3,100 in the four months it was in effect.

NY: A federal jury has awarded \$111,000 to two gay men beat up by three federal DEA agents. The DEA agents beat the men while shouting anti-gay slurs at them in 1988. The vicious attack ended when a passerby stopped to take photos. The agents then arrested the victims and charged them with assault.

Germany: On May 21, 1995, Peter Struedinger and another prisoner at the prison in Celle took a guard hostage and escaped from the maximum security prison in this city. The prisoners demanded \$140,000 and safe passage. They were given the money and embarked on a cross country chase before being recaptured later that day. This marked Struedinger's second escape from the same prison, eleven years to the day. On May 21, 1984, he took a guard hostage with a homemade shotgun and fled in a car driven by a prison official with a bomb around his neck. He stayed free for a day that time.

GA: Movie fans may recall films such as West World and Sex World where clients would get the full experience associated with that theme. Welcome to Prison World, but this isn't a movie. The Academy Training Center charges its customers to experience "an authentic incarceration experience." The 3,000 Sq. Foot facility includes a cell block, solitary isolation cell, padded cell, intake area, etc. Opened in January, 1995, the guard/instructors are moonlighting cops, prison guards and military personnel. They will arrange specific and "authentic" scenarios around themes such as prisons, county jail, POW camp, brig, etc. Most sessions last 3-4 days. Alas, they don't use real prisoners, so clients have to put up with other clients as their fellow "prisoners."

DC: Three district of Columbia cops, John Hannon, Troy Taylor and Dwayne Washington, are facing sentences of 49 to 55 years in federal prison after accepting \$2,000 in bribes from FBI agents posing as drug dealers. The cops all agreed to

escort drug dealers in and out of the city in exchange for the bribes. The cops refused plea bargains of less than ten years in prison. Federal Judge Thomas Hogan said the mandatory sentences he would impose were "overly long, overly harsh and tragic."

Japan: On May 27, 1995, the government announced it had executed, by hanging, three convicted murderers. Fifty six prisoners remain on death row. Japan does not allow witnesses at executions and gives no advance notice. Prisoners' relatives often learn of the execution only when they are told to retrieve the prisoner's bodies after executions.

GA: Governor Zell Miller announced that over 300 illegal aliens in state prisons would be paroled and deported, saving \$6 million and freeing up much needed prison space. Only prisoners convicted of nonviolent offenses are eligible for release. The parole board will release the prisoners which will be turned over to federal immigration officials and deported to their native countries.

NY: Ramzi Yousef is the accused leader of the plot to bomb the world trade center in 1992. Held in total isolation in the Metropolitan Correctional Center his lawyers filed a motion that his conditions of confinement be improved. At the May 31, 1995, hearing, judge Kevin Duffy scolded jail warden Rick Reish for taking Yousef's watch, Koran, coffee creamer, toothpaste and mouthwash. The judge stated that the case had international ramifications. Reish claimed the items were taken because they were dangerous. Duffy was angered at the BOP lawyer's inability to explain the dangerousness of the seized items and ordered Reish to take the stand. Reish said Yousef's watch, purchased from the jail commissary, was taken because could be used to make a bomb timing device. Duffy asked "Exactly what would he connect the timing device to?" Reish replied that coffee creamer was "very flammable." Duffy ordered the items returned.

IL: A fight between rival gang members in the Cook County (Chicago) jail on May 28, 1995, left two prisoners dead and 26 injured. The detainees fought with makeshift, knives, broom handles and other weapons. The cause of the fight was not disclosed.

AZ: The Edna McConnell foundation offered the state of Arizona \$100,000 to study alternatives to prison. Fife Symington, the state's governor refused

to accept the money saying he wanted no part of keeping lawbreakers at large.

MA: Albert Lewin was acquitted of killing a Boston police detective in 1990. In April, 1995, a jury awarded him \$225,000 in damages after finding he had been beaten by three jail guards while awaiting trial. Lewin was acquitted after two policemen were charged with perjury in the case and illegally seized evidence was suppressed. The city will pick up the tab for the guards.

IL: Leonard Kurz, a former Chicago cop, was sentenced to only 8.6 years in prison on April 26, 1995, for committing three armed robberies while in uniform and on duty in 1988.

From Senegal In Struggle

by Demba Diop

The West-African state of Senegal was created by its former French colonial rulers, who upon granting "Independence" to the country, set up a puppet government subservient to both its former French masters and the multinational corporations, who perpetuate the looting of Senegal's raw materials and exploitation of cheap labor as in the rest of Africa and throughout most of this planet.

As elsewhere the mass media is rigidly controlled by the state, which falsifies and manipulates the "news" to its own benefit. Of Senegal's population 80% are illiterate and only 10% of the educated complete University studies, priority is given in order to ensure the continuation of the present social/political set-up.

In this situation many of Senegal's disinherited people have been forced through poverty and unemployment into drug-addiction, prostitution, petty crime and finally prison. The policy of the Senegalese regime has been to build more prisons in an attempt to contain and silence the widespread discontent of the oppressed masses. As in neighbouring Mauritania the regime rules with ultra-repressive insurgency laws and has forced many members of the political opposition into exile.

For Senegal's poor the fight for human rights and dignity is far from finished. They are increasingly gaining confidence in confronting their oppressors. On the 16th of February 1994, mass street demonstrations took place in Dakar, the capital city of Senegal, against the Senegalese

regime. The state reacted as usual with widescale oppression, provoking the killing of six cops by the demonstrators. Following these incidents the state launched a witch-hunt, this led not only to the imprisonment of known leaders of the political opposition but also around two hundred Senegalese men and women wrongly accused of provoking the execution of the six cops. These prisoners are at present dispersed throughout the country's prison system.

From little acorns...

Two long term support organisations have been set up by revolutionaries in Senegal. The first, Solidarite Action has been created to ensure that Mauritanian refugee children in Senegal and Senegalese children repatriated from Mauritania, street children, handicapped and impoverished children are given education and health care with the aim of enabling them to take care of themselves.

"The political work cannot be separated from the social work. The children of today must be made aware of the mistakes of their parents. A good political work must begin with the children who could otherwise become the oppressors of tomorrow".

Solidarite Action also plans to arrange for released prisoners to share their experiences with the children in order for the children to avoid falling into the same traps and ending up in prison themselves. The second organization, Internationaliste Solidarite aims to provide support for both political and social prisoners. The organization is not aligned to any Senegalese political structure, being internationalist in outlook it works only for the interest of prisoners, not just in Senegal but throughout the world. At the moment the organisation is attempting to provide assistance and publicity for the political prisoners in Senegal and also on an international level (such as with John Perotti in the U.S.). They also hope to create links between prisoners in the U.K. and Senegal.

"To destroy all these fascist concentration camps in which our comrades are still kidnapped, it's necessary that we work together through an international information network. We will get no positive results so long as we work in dispersion."

Internationaliste Solidarite urgently needs to open an office which will function as an information bureau and space for vital prisoner support work. In order to ensure that such an undertaking is effective they have estimated that they will

need to raise about 1000 pounds. This would get the office up and running, pay for equipment and facilities for the production and distribution of information including the first edition of a news bulletin, which would be shared as widely as possible (with the aim of improving the day to day conditions of detention and methods of political struggle in prisons), correspondence with prisoners in Senegal and beyond, visits to prisoners and their families, providing stamps for prisoners and the launching of a campaign of mass mobilisation in order to demand the freedom of prisoners and to confront the jailers and their henchmen.

INTERNATIONAL APPEAL FOR SOLIDARITY

At the moment the economic situation of our comrades in Senegal is desperate in the extreme. Therefore we are appealing for donations of money, stamps, office equipment, (anything from envelopes to printing presses or basically anything else which you think may be of use). Perhaps you and your mates could get together a benefit event to raise money. (Please also reprint this article if you produce a newspaper or zine). This is not another charity appeal for Africa. It is an appeal for solidarity. The difference being that solidarity is a two way thing. We're here for them and vice versa.

To contact Internationaliste Solidarite, write to: Mame Demba Diop, c/o 22B Fass-Batiment, Dakar, Senegal, West Africa.

To contact Solidarite Action, write to:

Siege Social
Appartement 4T H.L.M.
Fass- Paillotte, Dakar
Senegal. West Africa.

Please send all donations and enquiries for further information to the Huddersfield A.B.C. address (cheques/postal orders - payable to - R. Taylor):

Huddersfield Anarchist Black Cross
31 Manor Row
Bradford, BD1

[Editor's Note: Demba is a long-time revolutionary activist and supporter of *PLN*. He is also a former political prisoner. We urge readers who can assist him to please do so.]

P R I S O N

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Civil Forfeiture and Criminal Prosecution as Double Jeopardy:

They Hogged Us -- Will They Be Held Accountable?

by Jeffrey Steinborn

They did it. That's right - your Government did it. Having been warned by their lawyers of the constitutional defects (and inherent unfairness) in their policy of impoverishing a drug defendant through civil forfeiture, then prosecuting him or her with a criminal

indictment for the same conduct they went ahead and did it anyway. The result of this unusually stubborn act of overreaching is a legacy of at least six years of convictions and forfeitures that may be subject to attack.

The troubles for the Government started with *United States v. Halper*, 490 U.S. 435 (1989), which ruled that: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes is punishment, as we have come to understand the term...." Meaning: where the Government brings a civil forfeiture and a criminal prosecution based upon the same conduct in separate proceedings, the Government subjects the defendant to a violation of the prohibition against double jeopardy. In these few words the Supreme Court potentially put a choke chain on a runaway government practice described by one pundit as the conduct of "children without adult supervision."

After *Halper*, *U.S. v. McCaslin*, 863 F. Supp. 1299 (WD WA 1994) and *U.S. v. \$405K*, 33 F.3d 1210 (9th Cir.1994), as amended 5/30/95, took the lead in attempting to curb the Government's greed. Duane McCaslin was the first to challenge the double proceedings policy. He

was arrested in 1990 for growing pot at home. The Government first sought to forfeit his home. Hoping that we understood the writing between the lines in *Halper*, we settled the forfeiture and waited for the Government's next move. When McCaslin was indicted, we moved to dismiss the charges, arguing that under *Halper*, a sanction which is not solely remedial is punishment for purposes of double jeopardy, and that the forfeiture of his home was, at least in part, a punishment prohibiting further punishment. The Government could not we argued, get two bites at the apple when the apple is a defendant charged with a crime. Such a defendant has a constitutional right to settle his beef with society once and for all, in a single proceeding.

The U.S. Attorney laughed. No, it was more of a snicker. The trial court and the Court of Appeals for the Ninth Circuit slam dunked us, summarily dismissing the arguments that to us, at least, seemed so inescapable. McCaslin went to prison, though not for the five years the Government wanted. After listening to a commercial plant propagation expert who came to court with earth under his fingernails and pants with built-in knee pads, the court concluded that less than half of McCaslin's sickly little crop

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Forfeiture (continued)

would mature into adult plants. At less than 100 plants, the guidelines gave him a sentence of 15 months.

Then the Supreme Court decided *Austin v. United States*, 113 S.Ct. 2801 (1993), stopping just one step short of accepting the rule we had argued in *McCaslin*. Forfeitures, the court ruled are punishment. Yes!!

Steinborn & Assoc. brought *McCaslin* back before the same trial judge under 28 U.S.C. §2255. The Department of Justice sent a lawyer from Washington, D.C. to Seattle to battle the stubborn lawyers who wouldn't go away. On September 2, 1994, after commenting at oral argument that the issue was "momentous," United States District Court Judge William Dwyer reversed himself and vacated *McCaslin*'s conviction. One week later, in a case handled entirely by prisoner third-year law student Michael Montalvo (and, contrary to some rumors, without the help of any lawyers), the Court of Appeals for the Ninth Circuit followed suit. In *U.S. v. \$405k* (a civil case), the court ruled that they had been wrong in *McCaslin*, and that forfeiture - not just of property used to facilitate a crime, but also of property which was the proceeds of crime - was punishment for purposes of double jeopardy. On May 30, 1995, commenting only that their decision was "compelled" by Supreme Court authority, the Ninth Circuit refused to reconsider its earlier opinion. As of this writing the mandate in *\$405k* is stayed until September 6, 1995, so the Government can decide whether it wants to take the case to the Supreme Court where it might become the law of the land, or leave it as final and fight the battle in other circuits with cases with better facts.

What do these cases mean? If the law stays as it is, and if the law from the Ninth Circuit spreads to the other circuits, many victims of the Government's failed war on drugs may have a chance for some relief. (The Government claims it has prepared a list of persons around the country who might be these victims, but they aren't giving it up. This may

be the meat for a class-action lawsuit.) Here are the basics:

If you:

1. Had property taken and also were prosecuted criminally;
2. By the same sovereign (state and federal Governments are generally separate sovereigns, not limited by double jeopardy);
3. For the same conduct;
4. In separate proceedings, you may be a victim of a double jeopardy violation. If so, whichever punishment came second is void.

The analysis is complex and getting more so as the Government, caught with its pants down at first, begins to learn how to respond to the avalanche of § 2255 and state habeas corpus petitions these two West Coast cases have started.

Here is an outline of the Government's latest "defenses" (that word seems strange when applied to the Government, doesn't it?)

1. *The courts didn't really mean what they said in Halper, Austin, McCaslin and \$405k.*

We like his argument. It is so clearly wrong that, like the thirteenth stroke of the clock, it casts doubt on all which precedes it.

2. *It's not double jeopardy because the state did the prosecution, while the Feds took the property.* This argument, too, has a vulnerable spot. Every time the feds take property, they share it with the local agencies who participated in the seizure. You can imagine the kinds of self-serving documents filed by greedy local police agencies in an attempt to get part of the loot. Their pleadings become our evidence of "agency" between the otherwise separate sovereigns. This is the Achilles heel that we hope will defeat the Government's separate sovereigns argument.

Recent case law, *United States v. Real Property Located In El Dorado County at 6380 Little Canyon Rd.*,

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or

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__F.3d__, (9th Cir. 7/12/95), holds, without analysis, that the fact that a state agency may share in the proceeds of a federal forfeiture does not make the Fed's agents of the state for purposes of defeating the "dual sovereignty" defense. The superficial analysis in this case invites further litigation aimed at showing that requests by the state to share in the loot are never denied, and that there is, therefore, a de facto agency between the Feds and the local agencies.

3. *It's not the same conduct.* This is a complex issue. While the Supreme Court has used the words "same conduct" repeatedly, the government is arguing, and some courts are agreeing, that the more restrictive test called the "same elements" test must be applied. This means, for example, that the government could prosecute criminally for the charge of conspiracy, while forfeiting property for the underlying substantive crimes and overt acts without violating double jeopardy. If the Court accepts this argument the reach of these new cases will be limited. This argument has dangers for the government as it is inherently unfair: should the Government be allowed to punish a person twice for the same acts simply by focusing on the individual acts in one proceeding and then lumping them together in another? *U.S. v. Felix*, 112 S.Ct. 1377, (1992), seems to say yes, but the inherent unfairness of this procedure seems so self-evident that it may well be that the best way to meet it is to let the Government once more overstep until even our timid courts can't stand it.

4. *They aren't really separate proceedings.* This argument worked once, in *United States v. Millan*, 2 F.3d 17 (2nd Cir. 1993), which held that a civil forfeiture and a criminal prosecution, though filed and tried separately, are merely a "single coordinated proceeding." Most other courts that have reached this issue have rejected this argument, and even *Millan* seems to have been forgotten by the court that decided it. See, *United States v. \$445,139.00*, 18 F.3d 73 (2nd Cir. 1994). This is another one of those government arguments which, if allowed to proceed to its logical conclusion, would yield such harsh and unfair results that it may be its own worst enemy.

Relevant here is *United States v. Ursery*, (6th Cir. 7/13/95), a defense victory. *Ursery* rejects the Government's arguments that settlement of the civil forfeiture constitutes waiver of the double jeopardy protection, that forfeiture and the criminal prosecution can never be the same conduct, that parallel proceedings are not separate, and, "agreeing with \$405k", holds that forfeitures under 21 U.S.C. § 881(a)(7) are categorically punishment. Current rumors have it that the government will seek to join *Ursery* and \$405k in a petition for certiorari to the United States Supreme Court.

5. *The defendant has no standing because s/he didn't contest the forfeiture by filing a claim.* This argument, based on *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994), presents a complex issue. Recent case law in a district court of the Ninth Circuit (*United States v. Pius Aileman*) meets it squarely and well: You are punished if your property is taken. You don't have to engage in an arguably frivolous defense of your property, jeopardizing your Fifth Amendment right to remain silent in order to have been punished by the loss.

Unfortunately, the 9th Circuit just spoke on this issue. *United States v. Cretacci*, (9th Cir. August 4, 1995) rules that the failure to file a claim is fatal to a double jeopardy defense. This decision will prevent relief in a large number of cases. Its clearly erroneous holding that one "abandons" property by failing to file a claim for it flies in the face of the excellent logic of *Aileman*, ignores the reality that many defendants are caught between loss of their property and self-incrimination, and encourages courts around the country to take the easy way out. This holding will be strenuously opposed by Cretacci, and by others who have similar claims pending. Like *McCaslin*, it may take some courageous work by the Supreme Court to set this one straight.

So too, in the third circuit. *United States v. Baird*, (3d Cir. 8/11/95) holds that administrative forfeiture where no claim is filed does not constitute punishment. Like Cretacci, this holding makes no sense, and will be strenuously opposed. Circuit Judge Sarokin filed a dissent, arguing that "double jeopardy

can arise following a forfeiture even where defendant has not participated in the forfeiture proceeding, if the defendant can establish that he was the owner of the forfeited property and that such forfeiture constituted punishment."

6. *The defendants waived the double jeopardy issue by pleading guilty or settling the forfeiture action.* Our opposition to his issue, while somewhat complex, has been successful.

Although a plea waives most factual objections, a double jeopardy argument that can be made from the existing record (mostly documents generated by the Government) is not waived by a plea. Settlement of a forfeiture waives nothing that is not specifically waived. Relevant here is *United States v. Wong*, (9th Cir. August 10, 1995), which holds that a prior administrative forfeiture which was abandoned by the government was not an attempt to punish, and, therefore, did not implicate double jeopardy. Along the way *Wong* adopts the argument that a guilty plea does not waive double jeopardy.

7. *The remedy is not retroactive.* This argument has been uniformly rejected. *McCaslin* observed that our double jeopardy attack on the Government's overreaching was merely the application of an old rule to new facts. Accordingly, this rule should apply to all cases. Certainly it must apply to cases as far back as 1989, when the Court announced the *Halper* decision.

This summary, I admit is only a teaser. For a more detailed discussion I recommend our book entitled FORFEITURE AND DOUBLE JEOPARDY: HOW TO TURN PROSECUTORIAL OVERREACHING INTO RELEASE OF PRISONERS AND RETURN OF SEIZED PROPERTY. Written by attorneys Reba Weis, Brenda Grantland and Jeffrey Steinborn. It is available from F.E.A.R. Foundation, 265 Miller Avenue, Mill Valley, CA. 94941, (415) 388-8128. A second edition, incorporating new cases and developing new arguments, written and edited by the team which is now preparing to defend \$405k if it reaches the Supreme court, (Brenda Grantland, Jeffrey Steinborn, Jeffry Finer, Shawn Perez, and prisoner

Forfeiture (continued)

law student Michael Montalvo), will be available soon from the same source.

The future of the double jeopardy defense is unclear. While some courts bravely accept what seems compelled by Supreme Court precedents others exercise "peremptory ducks" by clinging to transparently defective legal theories. Others, having discovered the easiest way to deny relief to a defendant, simply misrepresent and ignore the factual record before them. Is the judicial branch tough enough to hold the Government accountable? Is the government wise enough and fair enough to accept the lesson?

I read Harley Davidson, wants to copyright the word "Hog." Will they get all uses of the word, or will law enforcement forfeiture departments claim a common law right to the verb? (As in "let's go hog this sucker.") It all depends on the courts. Place your bets. ■

Law Offices STEINBORN & ASSOCIATES

Attorneys for:

U.S. v McCaslin, 863 F Supp 1299 (WD Wash 1994);
U.S. v \$405,098.23, 33 F3d 1210 (9th Cir 1994) "on rehearing"

- Forfeiture - Double Jeopardy
- Criminal Defense
- Recovery of Seized Assets

Steinborn & Assoc.

30th Fl, Smith Tower
506 Second Ave.

Seattle, WA. 98104

(206) 622-5117

fax: 622-3848

Internet: SURLAW@AOL.COM

Available for your representaion
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Supreme Court Rejects Govt Inter-Locutory Appeals in Civil Rights Suits

In a significant ruling the supreme court, in a unanimous opinion, has held that public officials who are sued cannot file inter-locutory appeals when a district court denies their motion for summary judgment based on the sufficiency of the evidence in the case. Instead, government officials can only appeal "neat abstract issues of law" before trial.

Qualified immunity is an affirmative defense to liability for money damages which can be, and usually is, raised by government officials sued for civil rights violations or constitutional torts. The qualified immunity defense requires a district court to determine whether or not the rights allegedly violated by the defendants in a civil action were "clearly established" at the time of the alleged violation. If they are, the defendants have no immunity and the case should proceed to trial. Past cases have allowed defendants denied qualified immunity to immediately appeal such orders. That right to appeal had been expanded by the courts to encompass denials of motions challenging the sufficiency of the evidence in the underlying case. The supreme court has halted that trend in what has turned out to be the only supreme court ruling beneficial to prisoners in the 1995 term. Any litigant involved in civil rights litigation should be familiar with this ruling as it significantly recasts the doctrine of qualified immunity appeals by government (i.e. prison) officials.

Brett Kimberlin is a federal prisoner serving time on drug and weapons charges. Prior to the 1988 presidential election he was scheduled to give a press conference, in prison, alleging that he had sold drugs to Dan Quayle while both attended college. On three occasions, just prior to press conferences being held, Kimberlin was placed in segregation and prevented from talking to the media. He filed suit claiming that his segregation was an effort by the Bureau of Prisons (BOP) to silence him. The district court agreed, see *Kimberlin v. Quinlan*, 774 F. Supp 1 (DC DC, 1991), *PLN*, Vol. 3, No.

2, denied the government's motion for summary judgment and scheduled the case for trial.

The government appealed and the court of appeals for the District of Columbia Circuit reversed, dismissing the case at 6 F.3d 789 (See *PLN*, Vol. 5, No. 3). The appeals court claimed that Kimberlin had presented only "weak" circumstantial evidence of retaliation and he was not entitled to conduct discovery in the matter. Both the majority and dissenting rulings emphasized their discontent with the legal standards applied solely in the District of Columbia circuit in suits against government officials. Kimberlin appealed and the Supreme Court granted certiorari.

The issues to be decided by the court were "(1) Must plaintiffs in *Bivens* cases in which unlawful motive is element of alleged offense satisfy 'heightened pleading standard' to survive motion to dismiss or for summary judgment based on assertion of qualified immunity? (2) Must plaintiffs in *Bivens* cases produce, prior to discovery, 'direct,' as opposed to persuasive circumstantial evidence of unlawful motive?"

On June 12, 1995, the Supreme Court issued its ruling, a one sentence per curiam decision stating: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Johnson v. Jones*, ante." *Kimberlin v. Quinlan*, 1995 WL 347384 (US), 63 LW 4556. A rather anti-climactic end to that case which did not really address the issues raised in the petition for certiorari. However, the court did give a ruling that will be very useful to prisoner civil rights litigants.

Houston Jones is a citizen who filed suit under 42 U.S.C. § 1983 claiming that five policemen used excessive force while arresting him and then beat him at the police station. Jones is a diabetic and was found lying in the street due to an insulin seizure. Thinking he was drunk, police arrested Jones and took him to the police station. When Jones regained consciousness he was in the

hospital with several broken ribs. After Jones filed suit in federal court three of the five policemen sued moved for summary judgment, claiming that whatever evidence Jones might have about the other two cops he could point to none showing that these three had beaten him or been present while others did. Jones responded by pointing to his sworn deposition where he stated that police had used excessive force against him as well as the cops' own deposition where they admitted being present at his arrest and in or near the booking room when Jones was there.

The district court denied the cops' summary judgment motion holding that there was sufficient circumstantial evidence to support Jones' theory of the case. The cops immediately appealed to the seventh circuit court of appeals claiming that the denial was wrong because there was no evidence in the record that any of them had actually struck or punched Jones. The appeals court rejected this argument, holding that it lacked appellate jurisdiction over the contention of evidence insufficiency that "we didn't do it." The appeals court dismissed the appeal. See: *Johnson v. Jones*, 26 F.3d 727 (7th Cir. 1994).

The supreme court agreed to hear the case because there was a split in the circuits as to whether appeal courts could hear such "evidence sufficiency" claims before a case has gone to trial when the claim is made by public officials (police, prison officials, etc.) seeking qualified immunity for their actions. The second, third, fifth and seventh circuits had ruled they lacked jurisdiction to hear such appeals while the District of Columbia, first, fourth, eighth, ninth and tenth circuits had made rulings that they could hear such appeals. Justice Breyer wrote the ruling for a unanimous supreme court holding that federal appeals courts lack jurisdiction to hear appeals by public officials claiming there is insufficient evidence to show that they violated clearly established law.

The supreme court began with an analysis of 28 U.S.C. § 1291 which grants appeals court jurisdiction to hear appeals only from "final decisions" of district courts. It discusses the problems in allowing piecemeal appeals and the

costs, delays and other issues that arise from interlocutory appeals. Congress has created several statutes which allow immediate appeals in cases involving class actions, granting or denying injunctions, certifying important legal questions, etc. None of those statutes apply to this case.

There are two judicially created exceptions to the final decision doctrine. One involves collateral orders that are separate from the claims asserted in the underlying lawsuit but which resolve important issues on their merits, especially in cases where if no immediate appeal is taken those orders become essentially unreviewable. One example of this is orders on the appointment of counsel. The second exception is qualified immunity rulings, more specifically, when a district court denies a public official's motion for summary judgment on the basis of qualified immunity that ruling may be immediately appealed as a "final decision." The supreme court has held that because immunity is a right to be free from suit, as well as damages, that protection is lost if a case is erroneously allowed to go to trial. See: *Mitchell v. Forsyth*, 472 US 511 (1985) and *Harlow v. Fitzgerald*, 457 US 800 (1982).

At issue in this case was "the appealability of a portion of a district court's summary judgment ruling that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. That is, the District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioner's involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute."

Justice Breyer said the court reached this decision for three reasons. First, it considered *Mitchell* as a case involving the application of "clearly" established law to a given, for appellate purposes, undisputed set of facts. "And the court, in its opinion, explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'genuine...' but the purely legal issue of what law was 'clearly

established.'" Thus the only issue involved was a review of whether or not the law was clearly established because public officials are generally entitled to qualified immunity, which means they are only liable for money damages if they violate "clearly established" law. The reviewing court is not supposed to consider the merits of the parties' claims on this type of qualified immunity appeal.

Second, "*Mitchell* rested upon the view that 'a claim of immunity is conceptually distinct from the merits of the plaintiff's claim....' It held that this was so because, although sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits (i.e., in the absence of qualified immunity)."

"Where, however, a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such 'separate' question-one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits (i.e., in the absence of qualified immunity)."

The court rejected the cop's argument that *Mitchell* "implicitly recognized that 'the need to protect officials against the burdens of further pretrial proceedings and trial' justifies a relaxation of the separability requirement.... Assuming that to be so, and despite a similar interest in avoiding trial in the kind of case here at issue, we can find no separability. To take what petitioners call a small step beyond *Mitchell*,... would more than relax the separability requirement-it would in many cases simply abandon it."

In supporting its ruling the court cited the practical day to day effects of litigation, in which trial judges are best positioned to determine the sufficiency of the evidence in civil rights cases rather than appeal courts. Interlocutory appeals of these are unlikely to bring about error correcting benefits in factual disputes, unlike disagreements over questions of law. The court also noted that "questions about whether or not a record demon-

Govt Appeals (continued)

strates a 'genuine' issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases, unlike the simple 'we didn't do it' case before us, involve factual controversies about, for example, intent controversies that, before trial, may seem nebulous." Resolving this type of conflict would immerse the appeals courts in time consuming and lengthy proceedings to review discovery materials and cause a lot of delay. Lastly, after upholding a district court's denial of summary judgment an appeals court is likely face the identical issue again on appeal, after a trial has changed the record enough to warrant another complete review of the record. "That is to say, an interlocutory appeal concerning

this kind of issue makes unwise use of appellate court's time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision."

"The upshot is that, compared with *Mitchell*, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law. Considering these 'competing considerations,' we are persuaded that 'immunity appeals... interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law."

"We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing 'clearly established' law, or (b)

a determination about 'genuine' issues of fact for trial, it still forces public officials to trial.... And to that extent, it threatens to undercut the very policy protecting public officials from lawsuits that (the *Mitchell* court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us."

In conclusion the court held that a defendant "entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." The seventh circuit's ruling was affirmed. See: *Johnson v. Jones*, 1995 WL 347244 (US), 63 LW 4552 (1995). ■

From the Editor

by Dan Pens

Welcome to another issue of *Prison Legal News*. This issue marks another step in our evolution. For the past year Paul and I have struggled to edit the content of the newsletter, trying as much as possible to keep the fluff out in order to make room for more case reporting. It has been a losing battle. The only way we can catch up (and keep up) with the backlog of cases we need to report is by expanding the format from 20 pages to a hefty 24.

This comes at a time, however, when prices for newsprint paper are skyrocketing. The price has more than doubled since the beginning of 1994. As such, we need to raise our subscription rates to keep from incurring a negative cash flow. The suggested donation for an individual/prisoner subscription will remain at \$12 per year, more if you can afford it. However, the Institutional subscription rate (for law libraries, universities, attorneys and other professionals, etc.) will increase to \$50 per year. This should offset the higher printing costs for the expanded format. That's all we're looking for. We need to recover

our operating expenses. If we're not doing that, we'll drop back down to 20 pages.

To help alleviate the price shock for our Institutional subscribers, we have coincided the rate increase with distribution of the long-awaited *PLN* subject/citation index. We completed the 1994 index and mailed copies to all (paying) *PLN* subscribers who have been with us since January of 1994. As soon as possible we'll get to work on the earlier years, starting with 1993 and working backwards. We're compiling the 1995 index as we go along. Starting with the January, 1996 issue, the annual index will be published in each January issue.

The 1994 index was photocopied, which is expensive. If you didn't get one, and want to order a copy, it'll cost you five big ones (\$5.00). At that price, you might be better off getting a "bootleg" photocopy from your local law library. Go ahead. We're not copyrighted.

It took us a long time to find a professional (with a Masters in Library Science) to take on the indexing project. When we saw samples of her work, though, it became apparent that we didn't want a professional, legal-type

index (with subject headings such as "Convicts", "Prisons", and "Constitutional Law") but rather an index that prison rights litigators can more easily use. So we developed our own system, with subject headings like "Disciplinary Hearings", "Retaliation", and "Consent Decrees." For those scholars and professionals with a preference for a more traditional index, we are indexed in the *UMI Criminal Justice Periodical Index* (starting with 1995) and the National Institute of Justice NCJRS Document Data Base (e-mail address: askncjrs@ncjrs.aspensys.com).

Compiling the index ourselves was quite a learning experience. It was a challenge to fit each article into one or another subject categories. Adding too many subject headings quickly makes the index unwieldy. One of the decisions on which Paul and I disagreed was where to pigeon-hole articles about the political disenfranchisement of prisoners - i.e. the fact that prisoners have no right to vote. Paul says the common sense solution was to put it in a category like "Voting" or "Elections." I decided to put those articles in the "Political Prisoner" category. Paul said that was goofy. But I

From the Editor (Cont.)

held my ground. Putting those articles in the "Political Prisoner" category makes a statement. That is, there are only a few who are political prisoners 365 days a year. But for the rest of us, no matter what the circumstances of our conviction or sentencing, we're all "political prisoners" on election day.

Speaking of political prisoners. We're pretty annoyed at the prisoncrats at SCI Greene, in Waynesburg PA. Paul sent a letter from our publisher to Mumia Abu-Jamal, asking if there was anything we could do to support him. The keen-eyed SCI Greene mail-room officials seized the letter and infringed Mumia for "corresponding with an inmate," even though the letter was unsolicited. Mumia got 30 days in the slammer. This is part

and parcel of the attempt by the state of PA to lynch Mumia. The PA DOC is doing whatever it can to see to it that Mumia is murdered. The infraction for the unsolicited letter of support gave them the excuse to deprive him of visits and contact with the media as his execution date was drawing closer. [Check out David Gilbert's review of Mumia's book in this issue of *PLN*].

In my May editorial I mentioned several publications that I enjoy reading and recommend to our readers. I left out two of my favorites. They are both quarterlies, which is probably why I forgot to mention them. I didn't have a copy of either anywhere near the top of my reading material stack. Check out *Covert Action Quarterly*, \$22/yr, 1500 Massachusetts Ave NW, #732, Washington, DC 20005. It's a top-flight investigative news magazine. One of the things I like about it is the generous footnoting. They let you

know exactly where they get their information. The most recent issue includes articles about the secret FISA (Federal Intelligence Surveillance Act) court that authorizes electronic surveillance within the U.S. There is an accompanying article by William Kunstler on the "Mugging of the Fourth" [amendment]. Very impressive, highly readable and informative. The other publication is *Media Culture Review*, \$16/yr (\$36 for Institutions), 77 Federal Street, San Francisco, CA 94107. The most recent issue has a "top ten" list of the most censored news stories of 1994, i.e. stuff the corporate media doesn't want us regular people to be informed about. Excellent, and highly recommended.

That's all for this month. Thank you for supporting *Prison Legal News*. Pass this issue along to a friend when you're done, and encourage them to subscribe, too! ■

Book Reviews

New Prisoners' Self Help Litigation Manual

Reviewed by Paul Wright

The *Prisoners' Self Help Litigation Manual (PSHLM)* by Dan Manville first appeared in 1983. It was designed to give prisoners an overview of the legal system, a basic overview of what their rights are and guidance on how to actually litigate a suit in federal court. The book went on to become enormously popular with jailhouse lawyers and in many court access cases it became a required part of prison law library collections. The second edition came out in 1986. As the years passed the book became somewhat dated in that the law pertaining to prisoners' rights was rapidly changing. Now, the third edition is finally available.

The latest edition, written by Manville and John Boston, is substantially improved over previous editions, with much larger sections on prisoners' substantive rights. It discusses the relevant case law pertaining to all aspects

of prison life: beatings, sanitation, food, clothing, medical care, censorship, disciplinary hearings, personal safety, use of force, segregation, access to the courts, religious freedom, visiting, searches, property and much more. If you are a prisoner, even if you don't plan to file a lawsuit yourself, reading this book will be a valuable experience. If you don't know what your rights are you can't seek help on enforcing them.

Most books dealing with prisoners' rights merely state what those rights are and leave it up to the reader to figure out how to enforce them. This is where the real value of the *PSHLM* comes in. This book gives an explanation of the legal system, different types of actions (i.e. civil rights, tort, habeas corpus, workers compensation, etc.), suing the right defendants, choosing a remedy, class action suits, and defenses prison officials are likely to raise. Then it gets down to the nitty gritty: how to actually file a suit in court and litigate it step by step all the way through the court system. It also contains a section on writing legal documents and conducting legal research.

Over the years we have been asked why *PLN* doesn't run articles telling prisoners how to file suits, do legal research

and basic litigation. Our response is that we try to remain an original source of information and there is little point in reprinting the same information already available in a much better format, namely this book. If you want to know how to enforce your rights this is the book for you. While the focus of the book is on prisoners and their rights I would strongly recommend this book to any non-attorney who is seeking an explanation of what all those fancy legal terms, procedures and such mean. If you are a free citizen too poor to afford counsel, this book will give you the basic information you need to research, file and litigate a lawsuit on your own. It has dozens of example forms, briefs and motions. Even attorneys, especially those with clients in jails or prisons, will find this book to be an invaluable quick reference, especially when an imprisoned client asks that age old question "can they do this to me?"

I came to prison in 1987 and shortly thereafter realized I needed to know what my rights were and how to enforce them. I bought my first copy of the *PSHLM* in early 1988 for \$16.00. I still have it and it's well worn, I definitely got my money's worth from it. If you can only

Book Reviews (continued)

afford to buy one legal book this should be it. Every prisoner should have a copy of this book, to go along with their *PLN* subscription of course. The book also lists publications of interest to prisoners/ a prisoners' assistance directory and recommended collections for prison law libraries.

The *PSHLM* is 1088 pages in length. It is extensively footnoted and well organized. My only complaint is that the chapters are not listed on the pages and the case and subject index does not list page numbers. In other words it could be a little more user friendly. But given the overall quality of the book this is a minor complaint. Prisoners should urge their law libraries to purchase the latest edition for their collection. Highly recommended. Copies cost \$29.95 for prisoners (includes shipping) and \$39.95 (plus shipping) for non prisoners. Contact: Oceana Publications, 75 Main St. Dobbs Ferry, NY. 10522. (914-693-8100) ■

How to Win Prison Disciplinary Hearings

Reviewed by Paul Wright

In the August, 1994, issue of *PLN* we reviewed the first edition of *How to Win Prison Disciplinary Hearings* by Allan Parmelee. Now we are excited to tell you about the completed State and Federal Edition. We gave the old *HTW* an excellent review and noted that its main use would be to federal prisoners because it did not cover many constitutional issues that would be of use to state prisoners. In the meantime Allan became a valued *PLN* supporter and volunteer and in our correspondence we encouraged him to consider rewriting the manual to include more caselaw to help prisoners litigate disciplinary hearings and information useful for state prisoners also. Fortunately for prisoners Allan has done so.

HTW covers all aspects of prison disciplinary proceedings, from elements of administrative procedures, building your legal foundation for a later suit

when you go to the hearing, how to win the hearing itself, sample appeals and elements of appeals and lots of case law concerning other aspects of prison disciplinary hearings. Most prisoners can expect to receive an infraction and appear before a disciplinary committee at least once during their term of imprisonment. The purpose of this manual is to inform you of what you are entitled to at the hearing, how to analyze the incident report, prepare your defense at the hearing, write an administrative appeal even if you are found "guilty" and then how to evaluate your legal options in event the appeal fails. [Editor's Note: In the August, 1995, edition of *PLN* we analyzed the Supreme Court's decision in *Sandin v. Conner*, the manual was written before that decision came out. It is still unclear what impact *Sandin* will have on prisoners challenging disciplinary hearings in court]. Allan has covered the *Sandin* case and it is now being printed for future *HTW*'s. Those requesting the Addendum and have already received a manual can send Allan a SASE for a free *Sandin* update.

The manual is over 140 pages in length and includes several useful appendices and list of cases. Extensively footnoted, the manual cites the relevant caselaw of what due process prisoners are entitled to at prison disciplinary hearings. No other manual covers the information, especially the administrative aspects of disciplinary hearings, contained in this one. It is well organized to include types of infraction, urinalysis, witnesses, due process, evidence, standard of proof, staff retaliation and legal basics.

Allan is a former federal prisoner who has first-hand experience winning prison disciplinary hearings. Prior to publishing this edition it was reviewed by the editors of *PLN* (the manual contains several case law reprints from *PLN*), and jailhouse lawyers John Perotti in Ohio, William Van Poyck in Florida and Edward Dittenger in Wisconsin. No armchair litigators here. How good is the manual? A promotional sample was taken to the Washington D.C. CURE convention in June 1995 by *PLN*'s publisher and someone wanted it so bad they walked off with it! Donation cost is only

\$9.95, checks, stamps or cash [Editor's Note: Allan has put a lot of time and effort into writing the manual and he has spent a tremendous amount of his own money to self publish the book, so if you can afford a bigger donation please send it]. Would the editors of *PLN* pay that much to get a copy? Absolutely. Highly recommended. To get a copy contact: Allan Parmelee, 2802 E. Madison, Box 168, Seattle, WA. 98112, (206) 325-2788. ■

Live From Death Row

by Mumia Abu-Jamal
(Review by David Gilbert)

“Perhaps we can shrug off and shred some of the dangerous myths laid on our minds like a second skin—such as ... the ‘right[s]’ to a fair trial even. They’re *not* rights—they’re privileges of the powerful and rich Don’t expect the media networks to tell you, for they can’t, because of the[ir] incestuousness ... with government and big business ... I can. Even if I must do so from the valley of the shadow of death, I will. From death row, this is Mumia Abu-Jamal.”

Setting the tone for the immediacy and hard-hitting reality of *Live From Death Row*. The author had been a member of the Black Panther Party as a youth, and later became a supporter of the radical M.O.V.E. organization. By 1981, Mumia Abu-Jamal was an award-winning journalist and an outspoken critic of police brutality in Philadelphia, when he was framed and railroaded to the death penalty for the murder of Police Officer Daniel Faulkner. Despite a plethora of injustices and legal irregularities in his case, Mumia is now stalked more closely than ever by execution. Pennsylvania's Governor Tom Ridge signed Mumia's death warrant on June 2nd, setting an execution date of August 17th, at 10:00 P.M.

As of October, 1994 there were 2,948 people locked in death rows in the U.S. Some 40 percent are African Americans, who constitute only 11 percent of the U.S. population. And the disparity based on the race of the victims—which

lives are or are not deemed valuable — is even starker. Meanwhile the death penalty is exceedingly rare for anyone with money and resources no matter how heinous the crime.

Last year National Public Radio (NPR) contracted Mumia to do a series of recorded commentaries about life on death row—and then, after intense political pressure, canceled them for “editorial reasons.” Now, thanks to the publishing house Addison-Wesley, you can read for yourself what NPR censored. *Live From Death Row* is comprised of those commentaries along with several of Mumia’s previously published essays. In addition, the book includes an insightful introduction by the acclaimed novelist, John Edgar Wideman, and an informative afterward by Mumia’s attorney, Leonard Weinglass.

The invaluable heart is the raw power of Mumia’s description and analysis. In my scores of book reviews over the years, I’ve never used the following phrase, so I don’t use it lightly: this book is a must read. The government carefully shields its citizens from glimpsing any human qualities in the condemned and from learning of the glaring inequities as the justice system grinds forward with the most premeditated of serial murders. Mumia Abu-Jamal’s eloquent writing lifts the shroud hiding some 2,948 souls inhabiting the netherworld of our death rows and thus exposes a darkness that sheds indispensable light for understanding our society as a whole. What is death row like?

Mix in solitary confinement, around-the-clock lock-in, no-contact visits, no prison jobs, no educational programs by which to grow, psychiatric “treatment” facilities designed only to drug you into a coma; ladle in hostile, overtly racist prison guards and staff; add the weight of the falling away of family ties, and you have all the fixings for a stressful psychic stew designed to deteriorate, to erode one’s humanity ...

Pennsylvania’s new death row maintains virtually around the clock solitary confinement, with a mere five hours a week for recreation in outside cages. For many, there is no psychological life. Mumia, always with a sharp eye for irony, notes that the prison permits the inmates TVs, which numb the mind, but not typewriters, which could be tools for legal liberation. Even family visits are turned into exercises in humiliation. In many states, non-contact visits are the rule, prevent-

ing the family and the condemned convict from touching. The denial of physical contact, along with all the other difficulties of making a visit, can atrophy emotional ties over time.

In addition to vivid, human detail on the conditions, Mumia challenges the broader politics of capital punishment. He shreds the pretense of “deterrence” by showing that the states that have led in executions have the highest murder rates. He provides a sobering example — the systematic perjury of a medical examiner who provided key testimony in thousands of criminal cases — of just how easy it is to condemn an innocent defendant to death. He dissects the *McCleskey v. Kemp* (1987) decision where the U.S. Supreme Court accepted the data showing extreme racial disparity in the application of Georgia’s death penalty but let it stand nonetheless. He sounds an alarm about the rapid march to eviscerate *habeas corpus* (the traditional right by which prisoners can bring constitutionally based challenges to their convictions before the federal courts).

Unlike other prisoners, “... death row inmates are not ‘doing time.’ Freedom does not shine at the end of the tunnel. Rather, the end of the tunnel brings extinction. Thus, for many here, there is no hope.”

But there are also many continuities. Indeed, while Wilbert Rideau and Ron Wikberg’s *Life Sentences* was so loudly promoted as providing the ‘real story of inside prison,’ *Live From Death Row* does a much better job. Mumia provides graphic examples of vicious beatings of inmates by guards, of psychological deterioration and suicides, and of medical neglect tantamount to attempted murder. Yet the perpetrators in the well-documented cases presented have not been indicted. As the author explains, “... words like ‘justice,’ ‘law,’ ‘civil rights,’ and, yes, ‘crime’ have different and elastic meanings depending on ... whether one works for the system or against it.”

While these violent incidents are the most dramatic, Mumia maintains perspective in explaining that violence is not the pressing daily issue for most prisoners: “The most profound horror of prisons lives in the day-to-day banal occurrences Prison is a second-by-second assault on the soul, a day-to-day degradation of

the self, an oppressive steel and brick umbrella that transforms seconds into hours and hours into days.”

The strength of Mumia’s writing is best seen in his vivid descriptions of prison life and in his ability to always educate the human element, even in brief sketches. The broader political essays in this collection are also short and crisp, usually to spotlight one key point or to expose a glaring hypocrisy rather than to present a comprehensive analysis. Thus, “Musings on Malcolm” doesn’t attempt a complete exegesis of his entire politics but does confront the latter-day efforts to water-down his message. Mumia forcefully reclaims the real Malcolm, the uncompromising scourge of American racism who died for the human rights of self-defense and self-determination. This book includes numerous other short essays on politics and criminal justice that are well worth reading: the pervasive national pattern underlying the infamous beating of Rodney King in Los Angeles; the danger, nonetheless, of the double jeopardy entailed in the federal retrial of the four police perpetrators who had been shamefully acquitted in a state trial; the sham behind the “get tough on crime” mania, which is a proven failure at reducing crime but a great success as a social program of public employment for a predominantly white sector of workers; the dark, repressive trend toward “Super Max” prisons in the U.S. with conditions of almost total lockdown and solitary confinement.

Mumia perspicaciously cautions against writing off today’s youth as “a lost generation,” as he outlines the social and cultural conditions to which they are responding and indicates the potential seeds for positive rebellion. “If they are lost, *find* them.” His two pieces on Huey Newton and the Black Panther Party show a rare ability to appreciate both the brilliance and the shortcomings of the man. Mumia also brings back into focus the crucial role the murders of 38 Panthers played in destroying the party and makes an impassioned appeal to revive the Panther Party 10-point social program:

The very conditions that gave rise to the party in the 1960’s—brutal cops, racist courts, ineffective education, joblessness and the like—still plague our people to this day.

Book Reviews (Cont.)

The release of *Live From Death Row* ignited a public controversy. The same forces who generated the pressure to cancel the NPR series—the Policemen's Benevolent Associations and Officer Faulkner's widow (who understandably is antagonistic to the man she believes killed her husband)—tried to stop publication of this book. They protest that murderers should not be allowed to profit from the notoriety of their crimes. The only counterpoints acknowledged in the mainstream media are the right to free speech and the interest of writings about death row.

As happens so often, the terms of debate turn reality on its head. It was not the notoriety of the case that created, spanking-new, a broadcast or publishing opening for Mumia. He was an award-winning journalist and had already appeared on NPR before the 1981 incident occurred. It was precisely his articulate voice for the African-American community and his sharp critique of police brutality that made Mumia a target of police harassment and attack. The result was Dec. 9, 1981, when Mumia was gravely wounded and beaten and then unscrupulously framed for murder despite several witnesses who saw the actual shooter flee.

The armies that occupy the ghettos and barrios can't abide an effective tribune for human rights and Black self-determination. They tried to kill Mumia to silence him in 1981; they are trying to kill Mumia to silence him today. This vibrant human being, with his robust voice for freedom, must live.

To demand that the execution of Mumia Abu-Jamal be stopped, call or fax:

1. Governor Thomas Ridge, (717) 787-2500; FAX (717) 783-3369.

2. Presiding Judge, The Honorable Legrome Davis, Chair of the PCPRA (which hears the petition to set aside the death penalty) (215) 686-9534; FAX: (215) 686-2865

To contact Mumia's Defense Committee: Friends and Family of Mumia Abu-Jamal P. O. Box 19709, Philadelphia, PA 19143 (215) 476-8812. ■

Chain Gangs Challenged in Court

In the July, 1995, *PLN*, we reported that the state of Alabama had re-introduced chain gangs to its prison system on May 3, 1995. We did not give much attention to the issue because it has received enormous media coverage, most of it rather sensationalistic. What the mainstream media has down played is that the chain gang practice is being challenged in court.

On May 17, 1995, Morris Dees, renowned civil rights attorney with the Southern Poverty Law Center in Montgomery, Alabama, filed the plaintiff's amended complaint in federal court. In the class action suit, *Austin v. James*, Case No. 95-T-637-N, the prisoner plaintiffs seek a court injunction barring the use of the chain gang as being barbaric, inhumane and exposing the prisoners to substantial risk of injury and death.

The 320 prisoners currently being forced to labor on the chain gang in Alabama were transferred to the Limestone Correctional Facility in Capshaw from other prisons in Alabama. Upon laboring on chain gangs for a given period of time they will be transferred back to their prison of origin. The idea for the chain gangs was first broached on, where else, a radio talk show by Fob James during his campaign for governor last November. Chain gangs were originally used in Alabama as a means of building roads for the automobile age. Chain gangs were abolished throughout the South by the early 1960's.

The complaint states that prisoners are chained together in groups of five and forced to labor for twelve hours a day along Alabama roadsides. Prisoners are given axes, shovels, blades and bush hacks to cut grass and pick up litter alongside roadways. Prisoners who refuse to work on the chain gang are handcuffed to a metal post, with their arms above their heads, and are forced to stand on an uneven surface all day in the hot sun.

The plaintiffs state that chaining prisoners together poses a substantial risk to their safety as they labor close to fast-moving vehicles. The complaint notes

that the mere presence of chain gangs increases the likelihood of accidents as motorists stop to gawk and rubberneck at the prisoners. Noting that the defendants' intent is to attract the attention of passing motorists, it has succeeded, in diverting drivers' attention from the road. Shackled prisoners are unable to move to safety in the event of an accident. If an accident does occur, the chains can drag a whole group of prisoners into an accident. Since the chain gangs started, several near accidents have already occurred as drivers slow down to gawk and honk at the prisoners.

Use of chain gangs also exposes the prisoners to other serious risk of harm. Forcing prisoners to work chained together for twelve hours a day creates conflicts between the prisoners, most of whom have a history of violent crimes. The prisoners are already armed which allows conflicts to escalate into deadly violence. Chained prisoners are unable to flee if attacked. Likewise, the ratio of one guard to forty prisoners is insufficient to protect the prisoners. The complaint states that in just the first three weeks of operation there have been several confrontations amongst the prisoners. When fights break out guards aim their weapons at the entire chained group. Other problems caused by chained prisoners are the risk of being bitten by poisonous snakes. Prisoners must urinate and defecate while chained to each other as well.

The complaint seeks relief premised on the theory that the above cited conditions violate the plaintiffs' right to safety, causes wanton pain due to sunstroke and chafing by chains. "Defendants' use of chain gangs constitutes an inhumane condition of confinement and offends the evolving standards of decency that mark the progress of a maturing society. The system of chaining men together like animals is a barbaric punishment. It is repugnant to civilized standards and common decency and violates plaintiffs' dignity and humanity." Moreover, chain gangs lack any type of legitimate penological justification. As we go to press there have been no rulings in the case.

Chain Gangs (Cont.)

We will report rulings in the case as they develop.

In response to the announcement by the state of Alabama that it was reintroducing chain gangs, Amnesty International, a human rights group, called on the US government to investigate the practice saying it may violate international treaties on prisoner and human rights. AI said that the use of leg irons is outlawed under United Nations rules for prisoner treatment. It also called on Alabama to halt the practice saying "This is the first time in recent history that the practice of shackling inmates together in chain gangs has been sanctioned by a U. S. state, and is clearly a retrograde step in human rights."

Litigation and human rights notwithstanding, politicians know a good

sound bite when they see one. As states try to outdo each other in the ill treatment of their prisoners it follows that when someone comes up with a good one others will copy it. So it was when Alabama announced that it would reintroduce prison chain gangs. Media from around the world have descended on Alabama to catch the spectacle of prisoners shackled together working in the sun.

Arizona politicians were quick to jump on the bandwagon. On May 15, 1995, the Arizona DOC began putting prisoners in shackles along Interstate 191 at the prison near Douglas. Some 26 minimum and medium security prisoners were cutting weeds alongside the road. The prisoners were shackled individually. Inside the prison, some 20 prisoners from protective custody were put to work using sledgehammers to break up concrete for erosion and flood control projects. The prisoners were

dressed in blue long-sleeved shirts with vertical orange stripes. A two foot piece of steel chain was padlocked to each prisoner's ankle.

Politicians in Florida have announced that chain gangs will be at work along Florida roadsides no later than December, 1995. Florida's "liberal" governor Lawton Chiles is supportive of the plan despite some tepid opposition voiced by DOC officials.

What no one seems to remember is that there is a reason chain gangs fell into disuse. One was that prisoners tended to scamper off when given the opportunity. Within the first month one prisoner escaped from Alabama's chain gang and two escaped in the first two weeks of Arizona's program by riding off in a DOC vehicle. As more prisoners escape, or are rescued by motorists, we'll see how popular the chain gangs remain with reactionary politicians. ■

Some Evidence Must Support Guilty Finding

When prison officials violate clearly defined procedural due process standards in a prison disciplinary hearing, they are not immune from § 1983 liability. Frederick Gilbert is a New York state prisoner. After 25 tape decks and 37 AC adapters were stolen from the prison's school program two confidential informants claimed that Gilbert had stolen the items. Based on this information Gilbert was infracted and charged with the thefts. At his disciplinary hearing Marilyn Demorest, the school official who discovered the theft, Joseph Beatty, the prison guard who took the informant statements and Gilbert testified. Beatty stated that one of the snitches was caught with a stolen tape deck and implicated a staff member in the theft, neither the snitch nor the staff member were charged with any misconduct and the matter was not pursued. The second snitch claimed that Gilbert had said he stole the items. Neither snitch claimed any personal knowledge about the thefts nor did they witness the thefts. Gilbert was found guilty, sentenced to 90 days in segregation, 90 days loss of good time and privileges and ordered to pay \$800.00 in restitution.

Gilbert filed a state habeas petition which the state settled. As part of the settlement the DOC expunged the infraction from his records and refunded his garnished funds. Gilbert then filed suit in federal court pursuant to 42 U.S.C. § 1983 claiming that the disciplinary hearing had violated his right to due process. He sought money damages for the 90 days spent in segregation.

The defendants claimed they were entitled to absolute immunity from suit. The court cited numerous cases holding that prison officials who conduct disciplinary hearings and rule on disciplinary appeals are entitled to only qualified immunity. Analyzing the defendants' claim of qualified immunity the court held that in 1989 (when this case arose) prisoners had a well established right to call witnesses at disciplinary hearings and not to be found guilty of misconduct absent "some" evidence to support the finding. Numerous cases involving immunity issues in disciplinary hearings are cited.

Turning to the substance of the claims the court held that no evidence supported the finding of guilt against

Gilbert. The anonymous informants had no first hand knowledge of Gilbert's actions. While the first snitch had provided reliable information in the past, the second snitch had not and there was no finding that he was reliable or credible. Numerous cases involving anonymous informant testimony are cited as to what standards must be met before such testimony can be used in prison disciplinary hearings.

The disciplinary hearing officer had refused Gilbert's requests to call witnesses at the hearing. The court concluded that most of the witnesses Gilbert had requested were highly relevant to his defense. The court held that Gilbert's due process rights were violated when the hearing officer refused to call the requested witnesses. The court held that higher echelon prison officials were also liable when they received Gilbert's administrative appeal and refused to remedy the constitutional violations. Thus, they were liable as well. See: *Gilbert v. Selsky*, 867 F. Supp. 159 (SDNY 1994). ■

Injunction Saves CA Family Visits

by Gail Harrington Wisely

In a victory in the long simmering war over family visits Michael Satris, an attorney with the San Quentin based Prison Law Office, won an injunction from Marin County Superior Court Judge Peter Smith Wednesday May 24 1995, barring the California Department of Corrections from implementing administrative regulations designed to prohibit several classes of prisoners from participating in the family visiting program. The effort to end family visiting in California prisons, long part of the politics of revenge practiced by Governor Pete Wilson the prison guards' union and their puppet victims' rights groups is unlikely to halt with this court action.

"Once again a liberal judge has ignored the feelings and wishes of the victims and their families siding with rapists, child molesters and murderers," Wilson proclaimed a day after learning of Judge Smith's decision in *Pro-Family Advocates et al v. James Gomez* (Marin County Superior Court No. 162051). The governor, continuing to exploit the public's fear of crime and hatred of criminals in his doomed attempt to win the Republican nomination for president, predictably blamed former Governor Edmund "Pat" Brown a Democrat who appointed Smith in 1965 for the ruling. Conveniently Wilson failed to mention that the family visiting program in California's prisons was started by then - Governor Ronald Reagan who was never accused of being liberal or soft on crime.

Former Assemblymember Dean Andal, now on the Board of Control, rushed to insert language in the 1994 Budget Act which prohibited the CDC from expending any funds for family visits for prisoners convicted of specified sex offenses July 7, 1994. The next day the Budget Act was signed into law and the CDC issued Administrative Bulletin 94/10 on July 14, 1994, effectively eliminating family visits for all prisoners ever convicted of violation of Penal Code Section 288, 288.5 or 289. San

Luis Obispo centered Pro-Family Advocates persuaded Satris to file a lawsuit to challenge the restrictions.

"Families are victimized daily simply because they love somebody in prison," said Sandra George, wife of a prisoner and an active member of Pro-Family Advocates. "This must stop. We are fed up with being treated as second-class citizens and we are making a stand against the oppression and lies of the state bureaucracy that cares not for the majority but caters to the minority of moneyed special interests." The prison guards' union gave Andal over \$60,000 and has donated large sums to Wilson and other lawmakers who decide bills related to prison expansion. They also provide some 85% of the budget for the Doris Tate Crime Victims Bureau, a vocal opponent of family visits, whose office just happens to be located in the union's Sacramento headquarters.

On December 7, 1994, Marin County Judge Beverly Savitt, issued a preliminary injunction stopping the CDC from restricting family visits pursuant to the 1994 Budget Act. The Court found the Act violated state and federal prohibitions against *ex post facto* laws. A law is considered *ex post facto* if it increases the punishment for a person convicted and sentenced before the law was passed. On the heels of that order, Wilson directed Joe Sandaval, Secretary of California's Youth and Adult Correctional Agency, to draft administrative regulations denying family visits for several classes of prisoners, including those covered by the injunction. On February 15, 1995, the CDC applied for an "emergency" rule change to the Office of Administrative Law.

Penal Code Section 5058(e), which took effect January 1, 1995, permits the Director of the CDC, or his designee, to obtain administrative regulation changes on an emergency basis by simply declaring that the new rule or amendment is necessary for the operation of the prison system. At the Legislative hearing on the bill which resulted in this excep-

tion to the Administrative Procedures Act, the CDC told lawmakers the normal regulatory process of public notice hearing and written response would only be bypassed in cases of actual emergency such as general insurrection or natural disasters affecting prisons. Yet the new law was used for the first time in an attempt to take family visits.

The temporary suspension of family visits under the emergency exception was supposed to begin February 25, 1995. However, Pro-Family Advocates, FamilyNet and other activist groups mobilized to generate an unprecedented outpouring of public protest. The voice-mail at the Office of Administrative Law was filled, fax machines at the CDC were jammed and hundreds of letters and telephone calls and telegrams opposing the proposed regulation were sent. Some 1,000 prisoners at the Lancaster maximum security prison participated in a general strike. Finally bowing to the pressure the CDC withdrew the February 25th date and issued a notice for an April 27th public hearing on the emergency regulation. May 30, 1995 was set as the new date for commencement of the 150 day suspension period.

At the April 27th hearing over 500 family members, friends, loved ones and supporters of people in prison showed up. Two representatives of the guards' union supported victims' rights group appeared. Ron Foster of Anaheim, California has a son serving life at the state prison in Tehachapi. He spoke of five generations sitting around the dining table during a family visit joining hands in prayer. With tears streaming down his face Ron told a CDC official at the hearing "All I can say is you're making the families the victims by doing this. You just can't imagine what this is going to do to my family."

The anti-family visiting forces have spread lies and half-truths to the public about the program. They claim California is one of only seven states to permit family visits. That's not accurate. Several states have furlough and day pass programs even for prisoners sentenced to life

and therefore don't need a separate family visiting program. The federal prison system doesn't have family visits, but permits many prisoners to earn passes to spend time at home with their loved ones. The CDC claims the family visiting program was intended for prisoners about to be released. That's also untrue. Reagan started the program as a means of curtailing homosexual assault and other violence in prison. And it's worked. It's the single most successful program in the California prison system.

The CDC flip-flopped on family visits. On April 21, 1993, CDC official Michael Neal sent a letter to Andal reporting that "combined correctional experience" found the program lowers recidivism and aids rehabilitation. In a 1989 pamphlet published by the CDC the program was described glowingly, "Good family relationships are believed to enhance the probability of the inmate's successful adjustment to prison and later to his successful reintegration into the community. Therefore the program is believed to be beneficial to society in general." The pamphlet stressed that these visits were much more than "con-

jugal" in nature but frequently included the prisoner's children, parents or siblings as well as spouse. Studies reported in various correctional magazines show that family visits not only increase a prisoner's likelihood of success of parole but reduce violence and disciplinary problems for prisoners who won't get out again.

The injunction was a victory in a war that's gone on for six years and shows no sign of ending. At least two bills, AB 226 and AB 411, will be heard by the California Legislature later this year. The first bill would eliminate the family visiting program entirely and the second bill is worded identically to the CDC's failed emergency administrative regulation change. The activists fighting to keep family visits are volunteers who must take time off their jobs on short notice and travel hundreds of miles to Sacramento in order to testify before lawmakers. They don't have the funding, free transportation, printing, office space, free telephones, political clout, or media access of the guards' union sponsored groups.

Family visits even for prisoners who will never be released have a positive

impact on society. The parents, wife, husband, brother, sister or children of a life prisoner are positively affected by these visits. These people were never convicted of committing a crime but taking family visits punishes them. Most people in prison are poor and keeping their families together is very important to them and to the community. Eliminating family visits will surely destroy many of these families. And there's the irony. Wilson and his ilk loudly espouse family values out of one side of their mouths while raging against the family visiting program out of the other. As one lifer at Tehachapi put it "Sometimes the only thing standing between me and serious trouble is a family visit. I don't get time off and I won't be paroled. Spending a day or two alone with my wife and kids means the world to me. Take that and I ain't got nothing to lose."

[The author is President of FamilyNet, a pro-family prison visiting advocacy group based in Costa Mesa, California. FamilyNet, 300 Santa Isabel, Suite C, Costa Mesa, CA 92627-1414.] ■

CA Prisoners Assault Prison Office

by Dan Pens

On May 5, 1995, at 9:45 am, five prisoners at the Calipatria maximum security prison walked into an "A Facility" program office and stabbed a sergeant. Three other guards rushed to her aid and they too were stabbed in a brawl that rolled through the office. It was not until four other guards arrived on the scene that they were finally able to disarm the prisoners. In all, five guards were stabbed and three others suffered various other minor injuries. We have no information on what, if any, injuries were suffered by the five prisoners. The prison was put on indefinite lockdown status.

Calipatria State Prison spokesman Lt. Tom Deschler said to the press that prison officials are "not really sure" why the prisoners launched the assault. "I don't think they were trying to take over anything, but it's a scary thought," Deschler said.

He said the attack "seemed planned," but that "we have no motive or anything like that."

The above comments, reported in the *Sacramento Bee* were made weeks after the incident, so Lt. "Spin Doctor" had plenty of time to gather information upon which to base his comments about the apparently senseless attack. As usual, the mainstream press gets its version of events from the prisoncrats. Whatever the government spin doctors have to say is "news" and the mainstream press accepts it, and prints it, without question. So why would five prisoners, in what appeared to be a "planned attack" storm a prison office and start stabbing guards without having a "motive or anything like that?" They must be mad dogs.

The *Bee* reported that the prisoners were "later identified as members of a South Central Los Angeles street gang." Not reported by the *Bee*, however, is the

fact that earlier that morning another member of the same gang, the East Side Crips, was beaten by Calipatria prison guards. The assault on the prison office, then, was apparently a calculated response in retaliation for the earlier beating.

To the *Bee's* credit, they did dig a little bit in an attempt to make *some* kind of sense out of what may have appeared to be a totally senseless assault. They pointed out that fourteen CA prisons are filled to over 180 percent capacity, and five are stuffed with over 200 percent of their rated capacity. They also cited a 1994 CDC Emergency Operations Unit report that compared current conditions in California's prisons to those that presaged violent, bloody uprisings in Attica, Santa Fe and Lucasville. They also interviewed a number of "experts" on the CA prison system, as well as several state

CA Uprising (cont.)

assembly members. One assembly budget committee analyst said that taking away prison "perks" like family visits and weight lifting, both of which experts say can serve as a measure to control prisoners if rationed in accordance with good behavior, amount to "emotive policy making" that places politics over "good penology."

The *Bee* article made some good, sound points... but by failing to interview some "experts" about the CDC, mainly those who live within its belly, the *Bee* missed the mark on this one. ■

Sources: *Sacramento Bee*, June 1, 1995; Letters from CA readers.

IL Change in Good Time Statute Unlawful

On December 22, 1994, the Illinois state supreme court held that an Illinois statute eliminating certain categories of prisoners from those eligible to early good conduct credit at an accelerated rate violates the state and federal constitutions when applied retroactively. The primary issue identified by the court was "whether elimination of an opportunity to increase good conduct credit is a change in the punishment associated with a crime or results in the infliction of greater punishment." This answer turns on the meaning of "punishment."

The court stated that for *ex post facto* purposes "punishment" does not simply mean the sentence imposed by the judge but "the actual time that such a person spends in prison." Therefore, as a general rule "any legislation curtailing the possibility of reducing actual prison time makes more onerous the consequences associated with a crime." The court held that under this doctrine the statute violated the *ex post facto* clause as applied to prisoners whose crimes and convictions came at a time when the prior version of the law allowed them to receive accelerated credit. See: *Barger v. Peters*, ILL S.Ct. No. 76945, 56 CrL 1337, 1/11/95. ■

Economic Reality Applied to FLSA Claims

Prisoners' struggle to be paid the minimum wage for their labor has met yet another setback. Nevada statute § 209.461(1)(b) requires all state prisoners, not in segregation or with a medical excuse, to work or go to school forty hours a week. Walter Morgan is a Nevada state prisoner employed in the prison's education center as a computer trouble shooter. The prison contracts with the White Pine County School Board to operate the prison's education center. The two entities then allow prisoners to perform various jobs there in exchange for a nominal salary well below minimum wage.

Morgan filed suit under the Federal Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* seeking to be paid minimum wage for his school labor. The district court dismissed his suit for failing to state a claim upon which relief could be granted. The court of appeals for the ninth circuit affirmed.

The court began its analysis by noting that *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc) [See *PLN*, Vol. 4, No. 10] did not categorically exclude prisoners from its coverage but it did significantly narrow the class of prisoners even potentially covered by federal minimum wage standards. The court in that case held that prisoners cannot be deemed "employees" under the FLSA when they work for prison run industries and are statutorily required to work as a part of their confinement. The court concluded that the economic reality was that prisoners' labor belongs to the state.

The court noted that *Hale* provided only broad outlines of the "economic reality" test to be used to determine whether prisoners are "employed" in the relevant sense for a FLSA standard to apply. The court relied on the Nevada statute requiring all prisoners to work to conclude "Morgan was in no sense free to bargain with would-be employers for the sale of his labor; his work at the prison was merely an incident of his incarceration." The court held that Morgan did not have a true employment relation-

ship with his employer, it was "penological, not pecuniary," thus he was not an "employee" under FLSA.

Morgan sought to distinguish his case from *Hale* because unlike the hard labor performed by the prisoners in that case, his work as a computer trouble shooter required a high degree of skill and training. The court rejected this. "Not so. Our holding in *Hale* did not turn on the fact that the prisoners there were engaged in hard labor or purely menial tasks. In fact, we noted that one of the plaintiffs worked as a bookkeeper and office manager.... hardly the sort of work normally thought of as hard labor. Determinative in *Hale* was the fact that the inmates' work in prison-run programs stemmed primarily from their status as incarcerated criminals.... This is no less true of the labor Morgan performed."

In the alternative, Morgan argued that the compelled labor in *Hale* was a form of punishment, while the labor he performed was solely for educational and rehabilitative purposes. The court again disagreed. "We did not base our holding in *Hale* on the view that the prisoners' work constituted punishment. The plaintiff in *Hale* who worked as a bookkeeper and office manager did so as part of a program that allowed inmates to run their own businesses while incarcerated. Work of this nature clearly doesn't promote the punitive objectives of the criminal justice system. Rather, as we acknowledged in *Hale*, prison programs of this sort serve primarily rehabilitative goals: They 'occupy idle prisoners, reduce disciplinary problems, nurture a sense of responsibility, and provide valuable skills and job training.' Thus, nothing in *Hale* suggests that a prisoner's status under the FLSA turns on the precise penological purpose for which his work is performed. So long as the economic reality of the employment relationship suggests that the prisoner's labor essentially belongs to the prison, the FLSA is inapplicable." See: *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994). ■

No Immunity for Visitor Searches

On March 3, 1989, a Kings County Assistant DA contacted the New York DOC's Inspector General (IG) and told him that he had received information that Joseph Varrone, a New York state prisoner, was involved in drug smuggling. More specifically, the DA claimed that an informant had told him that on their next visit his wife and son, Susan and Anthony, would attempt to give Joseph heroin. The IG reviewed Joseph's records and noted that he was in prison for criminal sale of a controlled substance. While there was an ongoing drug investigation at the prison Joseph was held at, he was in no way involved in the investigation nor suspected of any illegal activity. The IG's office ordered Varrone's family members searched the next time they visited. On March 8, 1989, the Varrones visited without being subjected to any type of search. After that visit Joseph was placed in segregation dry cell where a search of his feces revealed no contraband. On March 10, 1989, Susan and Anthony attempted to visit him in prison and they were told that before they could visit they would have to submit to strip searches. Prior to the search Susan and Anthony signed consents to the search. They were searched and no contraband was recovered.

The Varrone family filed suit under 42 U.S.C. § 1983 contending that the searches and segregation placement violated various rights, including the visitors' fourth amendment rights. The defendants moved for summary judgment which the court denied. While not stating any new law the case contains extensive case citations on the rights of prison visitors, from all circuits, for anyone who is litigating the matter.

In denying the defendants qualified immunity, the court noted that all courts that considered the issue have concluded that prison visitors retain a Fourth Amendment right to be free from unreasonable searches

and seizures. While visitors have a diminished expectation of privacy in prison they cannot be made to suffer a wholesale loss of constitutional rights.

The court held that as a matter of law the defendants had failed to show that the strip search of Susan and Anthony was based on reasonable suspicion. "Where, as here, authorities rely on information provided by a confidential informant, the tip must possess some 'indicia of reliability sufficient to give prison officials reasonable grounds to suspect drug smuggling activity' on the part of the individual searched. Reasonable suspicion exists only when 'the information contained in the tip is linked to other objective facts known by correctional authorities.'" Analyzing that applicable law and applying it to the facts in this case, the court noted that no objective fact or inference linked the Varrones as being possible drug smugglers. No evidence corroborated the informant's tip. "Rather, prison authorities apparently subjected plaintiff to one of the most demeaning and humiliating forms of government intrusion on the basis of nothing more than an uncorroborated confidential informant's tip."

The defendants claimed that the searches were required to thwart a reasonably suspected attempt to smuggle drugs into the prison. The court gave this short shrift, noting that no search was conducted before the March 8 visit despite the IG's orders that the search be conducted at the next visit. Likewise, the search of Joseph did not uncover contraband nor did the searches of Susan and Anthony. "...the information received by prison authorities subsequent to their learning of the tip not only failed to bolster, but actually questioned, the veracity of the information provided about the Varrones. Viewing, as it must, these facts in the light most favorable to the plaintiff, the Court holds that the confidential informant's tip, absent some measure of corroboration, fails to demonstrate

as a matter of law that the strip search of plaintiff was warranted." Whether reasonable suspicion existed would be decided at trial by a jury.

The court rejected the claim that by signing consents to the searches the Varrones had waived their fourth amendment rights. The defendants pointed to a sign outside prison which warns visitors that visiting may be contingent upon submitting to a strip search. The court agreed with several circuit courts that have held, in similar cases, that forcing a visitor to choose between an unconstitutional search and not being able to visit, does not constitute a valid waiver of fourth amendment rights. Thus, the "consent" forms which were signed had no legal value. "The Court also finds no merit in defendant's suggestion that the posting of the warning sign outside the facility rendered permissible an invasion of plaintiff's privacy rights." Other courts have rejected similar arguments as well.

The court rejected the defendant's contention that they were entitled to qualified immunity for their actions. The court cites numerous cases from several circuits holding that prison visitors retain a fourth amendment right to privacy absent reasonable suspicion on the part of prison officials. The official at the prison who carried out the search argued that he was required to obey orders from his superiors to carry out the searches. The court noted that he was also required to follow New York DOC directives. "Here, DOCS Directive 4403 tracked the language typically employed by the courts when discussing the reasonable suspicion standard, and set forth with utmost clarity the conditions that justify the strip search of a visitor at the Facility." See: *Varrone v. Bilotti*, 867 F. Supp. 1145 (ED NY 1994). [*The March, 1994, issue of PLN extensively discussed the rights of visitors and the right to visit in prison. Back issues are still available for \$1 each.*]

NY Prisoners Awarded Damages in Beatings

A June 4, 1992 incident at the Clinton Correctional Facility started when a prisoner standing in "rec line" waiting to be escorted to the keeplock recreation yard dropped a piece of candy on the floor. Several of his buddies started laughing and jostling with each other to get at the candy. The guards barked at them to "break it up," and two of the prisoners were told their recreation privileges were revoked and instructed to come to the head of the line. The two, Miguel Otero and Julio Villanueva, complied.

When they got to the head of the line, Otero was halted while two guards took Villanueva up the stairwell leading to F-Block. Halfway up the stairs, Villanueva turned his head to look back. One of the guards struck him with a fist to the jaw and dragged him into F-Block where they continued to beat him. Otero asked one of the guards what was going on whereupon he was struck on the shoulder with a baton. Another prisoner, Renaldo Graham, who had been standing near the head of the line tried to intervene and was grabbed by several other guards.

All three prisoners were taken to the hospital by separate groups of guards. It is the apparent custom of CCF guards to escort troublesome prisoners to the hospital, knowing that by the time they get there the prisoners will need medical attention.

Villanueva was handcuffed and shackled, thrown to the floor of the then empty F-Block, kicked, punched and spit upon by guards who used racial epithets. He was picked up, dragged to upper F-Block, thrown on the floor and kicked and beaten again. He was then dragged to an isolated mop room, thrown into some lockers and to the floor. By this time two Sgts. had arrived to "supervise" the beating. One Sgt. instructed guards not to hit Villanueva in the face with their batons, while the other Sgt. offered helpful tips like instructing one guard to lift Villanueva's arms up so another guard would have easier access to his back for more effective baton blows. At one point, guards removed Villanueva's shoes so

they could inflict painful baton blows to the soles of his feet.

Villanueva was then taken to the hospital and placed on a bench. One of the guards and a Sgt. both instructed him not to say anything to the medical personnel about the beating or he would receive further beatings in the future.

Otero had a similar trip to the hospital. He was shackled and beaten by guards, rolled down a flight of stairs, and then taken to a small phone room. A Sgt. stood in the doorway supervising the beating. Apparently other guards lined up in the corridor, waiting in their version of a "rec line" for a turn to go in the phone room and get a few licks in. When Otero finally arrived at the hospital, he was warned not to say anything about the beatings on pain of future violence.

Graham was shackled and escorted to the hospital, while being kicked, punched and showered with racial epithets along the way. At one point they forced him to lie on the floor of a corridor while he was photographed and examined by medical personnel. After the examination, Graham was taken to an isolated area of the hospital, punched several times in the back and face, and bludgeoned about the head with a baton.

As a result of the assaults, Mr. Otero spent almost 10 weeks in the facility infirmary recovering from massive head and leg trauma, including a broken bone in his foot. Mr. Villanueva suffered multiple bruises, swelling and abrasions over his head and body, especially his face, back and shoulders. He also suffered from a perforated eardrum. As for Mr. Graham, he received multiple body and head contusions and abrasions and a serious deep laceration over his left eye.

The three prisoners filed §1983 actions in federal court and were ably represented by Michael Cassidy, a staff attorney for Prisoners' Legal Services of New York. The federal district court for the northern district of NY ruled in favor of the prisoner plaintiffs after a five day bench trial. The court stated, "To

subject these plaintiffs to [this] type of treatment, particularly when in restraints, was not only excessive but cowardly..." Plaintiffs were awarded a total of \$18,000 in compensatory damages, \$13,000 in punitive damages, costs and attorney fees.

The "correctional" officers against whom the punitive damages were assessed are: Daniel Caron, Sherman Dubre, Jay Devan, Todd Parrone, Kenneth Waldron, Kris Bruno and Leigh Martin. The two sergeants are: Anthony Pavone and Harold Boyle. Boyle has since been promoted to lieutenant.

In a separate § 1983 action another prisoner, Nelson Cay, was awarded \$14,000 compensatory damages for what the judge termed a "quick, efficient and savage beating" meted out by CCF guards. Cay had argued with one guard in the chapel and was escorted away. Following CCF "standard operating procedure" he was taken to an isolated room and administered a beating by a number of CCF guards. Cay was also awarded \$1,000 in punitive damages to be paid by c/o Dubre, the same guard who had been ordered to pay \$9,000 in punitive damages for the beating he gave Otero in the above case.

In a statement to the press, Prisoners' Legal Services noted that this case "shows once again that there is a very serious problem with guard brutality at Clinton. In the past six years eight different federal court decisions have found that 27 Clinton Correction officers have assaulted inmates. Many other claims of this nature have been settled before they went to trial. Until the Department of Correctional Services takes serious measures to address the problems of guard brutality at Clinton, Clinton inmates will continue to suffer from assaults carried out by unsupervised, uncontrolled correction officers."

The plaintiffs in this case were transferred to other prisons. As of the date of the above court decisions, all of the defendant guards were still employed at CCF. ■

INS Detainees Trash Private Prison

On June 18, 1995, some 300 immigrants being held at the privately-run Esmor Immigration Detention Center in Elizabeth, New Jersey, chased out the guards, trashed the facility and held off federal, state and local law enforcement agents for nearly six hours. Police finally threw a flash grenade into a barricade the detainees had set up and stormed the facility. Twenty detainees were injured in the melee.

The Esmor facility was hastily set up in a converted warehouse just over a year ago when the U.S. government decided to "crack down" on immigrants who land at Kennedy and Newark airports with no papers.

The 240 men and 60 women detainees at the 300-bed center included Romanians, Cubans, Chinese, Russians and Sikhs, most of them seeking political asylum in the U.S. None of the detainees had been convicted of a crime. They had not even been *accused* of a crime. Many of them had been forced to flee their homelands due to poverty or persecution. They came to this country seeking the "American Dream" of freedom and democracy. What awaited them, however, was a nightmare of concentration camp imprisonment and brutal mistreatment. One young Somali woman told of being tortured and imprisoned in her homeland before fleeing to this country only to be imprisoned and brutalized yet again.

The detainees were "warehoused" inside the crowded, windowless facility for months while awaiting hearings. Some detainees say they were physically and sexually assaulted by guards. The female detainees complained of sexual abuse and guards spying on them while they showered. The immigrants were often shackled to their toilets or other furniture, and they were constantly taunted with ethnic slurs by Esmor guards. Former detainees say they were forced to take anti-depressant drugs, denied food or served spoiled food. Detainees objected to blaring television and bright lights kept on almost all night in crowded dormi-

tories, as well as guards pushing them around and trying to pick fights with them.

"They were really acting in self defense," said Peter Schey, an attorney at the Center for Human Rights and Constitutional Law, who filed a class action suit against Esmor in April. After the uprising the detainees were dispersed to widely scattered prisons and county jails in an attempt to silence them and keep their story from coming out.

The detainees released the following list of demands to the press, but to our knowledge the only publication to print it is the *Revolutionary Worker*. The demands are: 1) We should be treated as "Prisoners of Conscious" and not criminals. 2) We are entitled to a fair hearing. 3) We should not be used as an avenue to acquire wealth. 4) We need our freedom. 5) Conditions of detention are unacceptable. 6) We are covered by the 1947 United Nations Universal Declaration of Human Rights — right to life, liberty and property. 7) The INS and the U.S. government should observe the United Nations laws on refugee status. 8) Asylum seekers should not be kept in jails with hardened criminals. 9) Our trials are not democratic.

Esmor Correctional Services, the Melville, Long Island-based private corporation has a five-year, \$54 million contract to operate the facility, manages four correctional centers (mostly boot camps and halfway houses) and six detention centers. The other detention centers are in New York, Colorado, two in Texas and one in Seattle, Washington. Esmor's stock is publicly traded, with projected earnings of \$36 million this year.

INS officials said on June 19 that they expect the heavily damaged facility to reopen in 45 days and that it will continue to operate under Esmor's management. Union County, NJ prosecutor Andrew Ruotolo said that he would file a civil suit if necessary to keep that from happening. Ruotolo said that only

a dozen employees—who were trained for three hours and paid \$7 an hour—were guarding the facility at the time of the rebellion.

In an interview on June 20, Esmor chairperson James F. Slattery claimed that the INS was responsible for the uprising because it ordered the center built for stays averaging 90 days, while in fact delays in processing cases meant that detainees were stuck there for much longer periods. But assistant prosecutor Michael Lapolla said, "Esmor put minimal effort into this place. If privatization is the future [of corrections] then we're all in for big trouble."

Sources: The *Seattle Times*, June 20, 1995; *Revolutionary Worker*, July 2, 1995; *Weekly News Update on the Americas*, Issue #282, published by the Nicaragua Solidarity Network of Greater New York, 339 Lafayette Street, New York, NY 10012. ■

Guard Gets 10 Years for Beating Prisoner to Death

On May 23, 1995, Joel Lambright was sentenced to a 2 to 10 year sentence after being convicted of manslaughter for beating and kicking to death Michael McCoy, a prisoner. [See *PLN* Jan., 1995] Initially charged with murder, Lambright was convicted of manslaughter after the jury heard testimony that he and guard Alex Torres had entered McCoy's cell after a prison disturbance in October, 1994, and beat and kicked him into semi-consciousness. McCoy died of brain injuries the next day in a hospital. The prosecution argued that McCoy probably would have survived had he received prompt medical attention. Torres faces trial later this year on the charge of murdering McCoy. Lambright has made state history: he is the first guard ever convicted of murdering a prisoner in Texas history. His law enforcement career has come full circle: from prison guard to prisoner. ■

WA DOC Computerizes Visitor Tracking

Since 1993 the Washington state DOC has been working on a computer based program designed to track and manage people who visit prisoners. The program is called Public Access System (PAS). The hardware used includes an IBM compatible personal computer, video camera, bar code reader and laser printer. The software used includes DOS, Windows, Extra and the PAS program. The latter is custom software written and designed for the DOC by state Information Services Programmers.

The program was operational at seven of thirteen Washington prisons in early 1995 and was scheduled to be operational at all 13 by May, 1995. The current version of PAS performs the following functions: registers visitors, records personal visits, takes and retrieves digital visitor photos, identifies visitors by their bar codes, prints prisoner visiting lists, prints prisoner call lists, records comments by prisonrats, enforces visiting schedules, retrieves prisoner data and information from the OBTS (Offender Based Tracking System) and transfers PAS data and information between prisons. Future versions of PAS will perform the following additional functions: schedule trailer visits, record attorney visits, track volunteer visitors, print detail and summary reports and detect visitors who visit at multiple prisons.

Other plans for further computerization of the DOC/DOP include rewriting the grievance system software and pursuing satellite video conferencing, putting chemical dependency information on line so it can be shared with other state agencies; extending the imaging system used by the classification unit to all computer users within the DOC, including the attorney general's litigation office. The latter calls for converting the current LAN into a Wide Area Network. This will enable the DOC to disseminate prisoner information via e-mail for processing telephone responses from the governor's office, movement issues and referrals. The DOC plans to increase its use and reliance on e-mail. This will have the effect of eliminating much information that has been useful in litigation because there will be no 'hard copy' of incriminating documents. ■

Spitting by HIV+ Prisoner Results in Attempted Murder Conviction

By Paul Wright

Curtis Weeks, an HIV+ Texas prisoner, spit on a guard and was convicted of attempted murder. *PLN* rarely reports on criminal law cases and even more rarely do we do so under a by line. We report this case not for its legal value but its news value for our readers. Weeks spit on a guard and was charged with attempted murder. He was found guilty and the conviction was affirmed on appeal in the state court system.

This case involves his federal habeas corpus petition. He claimed he should not have been found guilty of attempted murder because merely spitting was not a means by which he could have, but failed, to kill the guard. The court noted that there are no recorded cases of HIV transmission by saliva and that even bites which break the skin have not been shown to transmit the virus where the biter was infected.

Weeks' "guilt" of attempted murder was affirmed because expert testimony showed that the virus "could" be transmitted by spitting if it contacted a mucus membrane. The spit had hit the guard in the face and went up his nose which is lined by mucous membranes. The court held that while the evidence was highly controverted and there were no known cases of HIV transmission by saliva, that did not mean that the state court's review "of other methods of salivary transmission are inappropriate or reflect an erroneous review of the elements of attempted murder in this case."

Given the irrational fear and ignorance that surrounds both HIV infection and its transmission it is a sad day when the courts condone and perpetuate ignorant stereotypes and criminalize otherwise harmless behavior. Weeks was sentenced to life for spitting on the guard. Given his HIV+ condition this amounts to a death sentence for spitting. See: *Weeks v. Collins*, 867 F. Supp. 544 (SD TX 1994); aff'd on appeal, *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995). ■

Detainee Entitled to Medical Care

The mere fact that a prisoner is "seen" by a doctor does not, by itself, constitute "medical care." Terry Guidry was a pretrial detainee in the Jefferson County Detention Center in Texas when he got into a fight with another prisoner. Instead of trying to stop the fight a jail guard struck Guidry, who in turn defended himself. The guard beat Guidry, put him in a choke hold and injured his jaw. Guidry requested medical attention but did not see a doctor for a week after the incident. The doctor promised to schedule an x-ray but never did. Guidry filed suit claiming that he was denied his right to medical care and that the beating constituted an excessive use of force.

The defendants moved for summary judgment which the district court denied. The court held that Guidry had not pleaded sufficient facts to support his excessive force claim. Noting that a complaint must state facts, not legal theories, the court gave Guidry an opportunity to amend his complaint to include the allegation that some injury resulted from the incident and that force was applied maliciously and sadistically to cause harm.

The court rejected the defendants' documents submitted in support of their summary judgment motion because they were not signed or authenticated as required by Fed.R.Civ.P. 56(c). Turning to the medical claims, the court noted that the defendants claimed to have given Guidry medical care on three occasions. "The quantity of the plaintiff's treatment is not the dispositive issue in an Eighth Amendment medical care claim. Instead, such a claim may rest on omissions or acts, that is, the quality of the care. The defendant could assert plaintiff saw a doctor every day for an entire month, but if the doctor did not treat a known and serious medical need, or rendered malicious treatment, then a cause of action would still lie." The court denied summary judgment on this issue. See: *Guidry v. Jefferson County Detention Center*, 868 F. Supp. 189 (ED TX 1994). ■

Court Formulates New "Use of Force" Standard

While pretrial detainees are imprisoned against their will and in many cases are similar in circumstance to convicted detainees they are legally innocent of any crime. This is an important distinction when it comes to detainees litigating jail conditions. *PLN* regularly reports on court decisions affecting jail detainees because such cases can often be used in prison litigation and vice versa. Many times the courts simply look at the law relevant to convicted prisoners, apply it to the detainee's case and if the defendant's conduct violates that standard the court goes no further in its analysis because detainees are entitled to more legal protection than convicts are. This case is different. Faced with a detainee's excessive use of force claim Judge Edenfield analyzed existing case law, found it wanting and set forth a new standard on this type of claim, which is of significant importance and may well be emulated by other courts. This well reasoned ruling should definitely be raised by anyone litigating this issue.

Harry Telfair was arrested and placed in the Chatham County jail in Georgia. He was denied a meal on one occasion and refused to return to his dorm until he was fed. Jail guards refused to feed him. Telfair had a prosthetic hip due to injuries received in a car accident seven years before. Jail guards grabbed, choked, slammed and twisted Telfair, took him to the jail's segregation unit and slammed him onto a bunk despite knowledge of his medical condition. At no time did Telfair offer any resistance. He filed suit contending that the rough treatment he received violated his eighth amendment rights.

The defendant jail guards moved for summary judgment claiming that they had not used excessive force against Telfair and that any force used was necessary to maintain discipline and order in the jail. The court denied the motion because there were material facts in dispute requiring a trial to resolve. The court gave a well reasoned and extensive ruling on the legal standards to be applied in use of force cases against

unconvicted detainees, as opposed to convicted prisoners.

The court began by denying the defendants qualified immunity for their actions, noting the cases relating to excessive force claims by prisoners. "Under the Fourteenth Amendment, the pretrial detainee has a right to be free from conditions or deprivations that are wanton, arbitrary or intended to punish." In denying the defendants qualified immunity the court held "Both standards are clear enough to hold state officials accountable to them, it requires little creativity or imagination for a reasonable jail official to guess that choking a physically handicapped detainee and knocking him over might constitute a constitutional violation."

The court analyzed the merits of Telfair's claim under a fourteenth amendment analysis, noting that the eighth amendment applies only to those convicted of a crime. "It would... be illogical for the Due Process Clause to protect still-innocent detainees less than the Cruel and Unusual Punishment Clause protects convicts,... but the corollary to that conclusion is not that Eighth Amendment jurisprudence governs disposition of Fourteenth Amendment cases." The court notes that its analysis of this question is extensive because there is little case law on this issue within the eleventh circuit. The court cites numerous cases from all circuits dealing with excessive force against innocent detainees and gives their historical context. After reviewing the existing case law the court noted that the Supreme Court has held that each type of excessive force case (i.e. by police, jail guards, prison guards, etc.) must be brought under a separate standard of legal review. The district court concluded that a new and specific Fourteenth Amendment standard was now appropriate, and proceeded to fashion it.

The court discussed the legal significance of innocence. Noting that pretrial detainees cannot be punished at *all* and that "it would be absurd to hold that a pretrial detainee has less constitutional protection against acts of prison guards than one who has been convicted," the court observed that since that famous statement was made "courts have applied

the *same* standard to both pretrial detainees and convicted prisoners." "There is a certain administrative neatness about this proposition. It appears to this court, however, that the standard by which official conduct toward pretrial detainees should be judged is properly significantly tougher than that used to assess official conduct post-conviction. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime; he has had only 'a judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest....' Under such circumstances the state may detain him to ensure his presence at trial and subject him to the restrictions and conditions of the detention facility... but he should not be indiscriminately treated as one who has been condemned by the state. The Fourteenth Amendment should provide greater protection to those individuals relative to their convicted jailmates."

The court noted that in *Bell v. Wolfish*, 441 US 520, 99 S.Ct.1861 (1978) the supreme court held that innocent pretrial detainees do not have a constitutional right to be "comfortable while detained for trial." "This court suspects, however, that a pretrial detainee's desire to be free from physical abuse by officers of the state might bear constitutional imprimatur; if the Due Process Clause protects free, legally innocent citizens from physical abuse,... surely that same Due Process Clause protects detained, legally innocent citizens as well. Beatings are "humiliating and physically invasive; far more so than the double-bunking, crowding and prohibition on care packages at issue in *Bell*."

The court rejected a "shocks the conscience" standard and a fourth amendment analysis used when police "seize" citizens. "But that burden should not be emasculated because pretrial detainees happen to occupy cells and halls similar to those of their convicted fellows." Noting that the rationales behind eighth amendment jurisprudence support this legal conclusion, the court stated "...the Due Process Clause of the Fourteenth Amendment does not provide the same leeway to punish granted by the

Law on Retaliation Well Established in 9th Cir.

Use of Force (Cont.)

Cruel and Unusual Punishments Clause of the Eighth. *Bell* recognized this distinction, and formulated a standard making unconstitutional any conditions or restrictions imposed on detainees with an 'intent to punish' them." "If... the state can punish convicts without violating the Constitution, and if the current Eighth Amendment standard reflects that leeway, how can that same standard be applied to pretrial detainees, who are explicitly protected from any 'punishment' at all?"

The standard the court formulated is a two prong test for excessive force involving pretrial detainees. A reviewing court must "First, search for evidence that the use of force was intended to punish the detainee.... This intent inquiry is not substantially different than the current Eighth Amendment requirement, although intentionally easier for a plaintiff to meet. Second, if there is no direct evidence of intent, determine (1) whether a legitimate interest in the use of force is evident from the circumstances, and (2) if so, whether the force used was necessary to further that interest.... [citing *Bell*] (noting that if conditions are so extreme that less harsh alternatives are easily available, those conditions constitute 'punishment'). As in *Hudson v. McMillian*, the detainee would not be required to show severe injuries.... If the jail official fails *either* prong, his conduct violated the pretrial detainee's due process rights under the Fourteenth Amendment." Applying these standards to Telfair's claims, the court held that the disputed facts required a trial to determine whether a constitutional violation had occurred. "Courts are fond of the observation that 'not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights....' Telfair, however, was no 'prisoner.' He was, in the eyes of the law, still innocent of any crime. It is not a controversial proposition that the Fourteenth Amendment might protect legally innocent, disabled citizens from physical abuse by officers of the state." See: *Telfair v. Gilberg*, 868 F. Supp. 1396 (SD GA 1994). ■

In the October, 1993, issue of *PLN* we reported *Schroeder v. McDonald*, 823 F. Supp. 750 (D HI 1993) in which a Hawaii prisoner filed suit over a retaliatory transfer from a minimum to a medium security prison. The district court held that the defendants were not entitled to qualified immunity and denied their motion for summary judgment. The defendants appealed and the ninth circuit court of appeals reversed in part, affirmed in part and remanded the case.

Shortly after arrival at the minimum security prison Schroeder began to complain about the lack of law library access. He sent complaints to Hawaii DOC officials and to all federal judges in the state. Prison staff told him they did not appreciate his sending complaints outside of the DOC or to DOC officials. The court held this indicated that a retaliatory intent was present on the part of the defendants.

Turning to the question of qualified immunity, the court noted that "The qualified immunity test requires a two part analysis: (1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful? *Act-Up/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993)."

Analyzing Schroeder's claims, the court held "First, the law governing defendants' conduct was clearly established. Specifically, the law clearly established that defendants cannot transfer a prisoner from one correctional institution to another in order to punish the prisoner for exercising his First Amendment right to pursue civil rights litigation. See: *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). Because the law governing defendants' conduct was clearly established, we must determine whether a reasonable prison official could have believed the conduct was lawful."

The second prong of the court's inquiry into the qualified immunity was whether "A reasonable prison official could have believed the transfer was lawful if he were advancing a legitimate penological goal and his means were narrowly tailored to achieve that goal *Rizzo*, 778 F.2d at 532. Legitimate goals of a correctional institution include the preservation of internal order and discipline and the maintenance of institutional

security." The court noted that Schroeder had received seven infractions in sixteen days at the minimum security prison. Further more, his security level was such that he should not have been transferred to minimum security to begin with. "Consequently, we conclude that defendants are entitled to the defense of qualified immunity with regard to the retaliation claim."

Readers will note that the court's ruling on this issue is highly fact specific. Namely, the fact that there were disciplinary charges supporting the transfer rather than a transfer that does not involve allegations of misconduct, etc. Even though the defendants were entitled to qualified immunity that should not moot claims for injunctive and declaratory relief. It appears that Schroeder sought only money damages.

Schroeder also claimed his due process rights were violated when he was transferred back to medium security with a security classification of 9, when Hawaii prison regulations required a level of at least 21. The court affirmed the lower court ruling that Hawaii prison regulations create a due process liberty interest that can be enforced via § 1983. Analyzing the defendant's qualified immunity claim under the two prong *Act-Up/Portland* test, the court concluded that the law on this issue was well established. "Specifically, the law clearly established that defendants must follow mandatory prison regulations. Second, could a reasonable prison official have believed the conduct was lawful? We conclude that a reasonable prison official could not have believed the conduct was lawful. Specifically, when defendants transferred Schroeder back to the medium security prison, Schroeder had a score of 9. Defendants knew that Schroeder had to have a score of 21 to increase his security classification. Thus, defendants acted in complete disregard for clearly established prison regulations."

"Accordingly, defendants fail the second part of the qualified immunity test. Consequently, we conclude that defendants are not entitled to the defense of qualified immunity with regard to the due process claim." See: *Schroeder v. McDonald*, 41 F.3d 1272 (9th Cir. 1994), amended at 55 F.3d 454 (9th Cir. 1995). ■

Medical Care Ordered

If a prisoner sustains a serious injury they are entitled to competent medical attention. Richard Sappington is a Texas state prisoner. He injured his foot playing basketball and x-rays revealed multiple fractures in the foot. The prison hospital lacked resources to treat the injuries and his foot was wrapped in a bandage and he was given crutches. He was scheduled for transfer to a hospital sometime within the next six months. Grievances and administrative complaints seeking medical attention were unsuccessful. Sappington filed suit in federal court claiming that the lack of medical care violated his eighth amendment rights. The court held an evidentiary hearing at which Sappington was produced and issued a Temporary Restraining Order (TRO) ordering his transfer to a hospital for treatment. Sappington received medical treatment almost five months after the injury occurred. The defendants moved for summary judgment claiming that because Sappington was given a bandage and crutches he could not show deliberate indifference to his serious medical need. The court disagreed.

The court denied the defendants' motion for qualified immunity holding that the case law is well established that prisoners must receive adequate medical care. Because there were factual issues in dispute, the court held that summary judgment was inappropriate. The court held that the lengthy delay in which Sappington went without treatment created a factual dispute as to whether the defendants had shown deliberate indifference to his serious medical needs. See: *Sappington v. Ulrich*, 868 F. Supp. 194 (ED TX 1994). ■

Attorney Fees Awarded in MCC Suit

Past issues of *PLN* have reported on repression and conditions at the Maximum Control Center (MCC) in Westville, IN and the legal challenges to those conditions as well as political struggle around it. The lawsuit was settled which resulted in numerous changes being made in the conditions of MCC prisoners, these conditions are set out in an appendix to this citation. After settlement the prisoners' attorneys moved for attorney fees which the Indiana DOC contested.

The Indiana Attorney General's office sought eight extensions of time to respond to the plaintiff's motion for attorney fees. The court denied the plaintiff's motion for default but ruled on the petition without the defendants' response. The court analyzed the current law on what party is considered to have "prevailed" in a settlement and concluded that the plaintiffs were the prevailing party due to the extensive changes that resulted from the litigation. Because the changes that resulted were not minimal the court held the plaintiffs were entitled to full attorney fees.

The court held that the requested fees of \$200 per hour for each attorney was reasonable given the attorney's experience, skill and the rates charged in the Indiana legal market. The court granted the attorney fees requested in their entirety. This came to \$301,229.83 for fees and expenses related to the litigation. The court expressed its annoyance at the fact that the fee petition had not been replied to by the AG's office despite a six month wait and eight extensions of time. See: *Taifa v. Bayh*, 868 F. Supp. 237 (ND IN 1994). ■

Diabetic Sues for Meals

Prisoners with medical conditions are entitled to special diets if needed to avoid illness. Robert Taylor is a diabetic and an Illinois state prisoner. His medical condition requires that he receive a special diet to insure that he receives the proper amount of sugars and carbohydrates. He was receiving the proper diet at the Joliet Correctional Center until the prison's food service contract was given to Service America Corporation (SAC), after which he never received the special diet. Taylor filed administrative grievances to receive the special medical diet and prison officials claimed they were working with SAC to ensure that he received a proper diet, however, nothing was done to ensure that he actually received the diet. Taylor filed suit pursuant to 42 U.S.C. § 1983 claiming that prison officials were deliberately indifferent to his serious medical needs by not providing him with a special diet. He claimed this failure violated the eighth amendment. The defendants filed a motion to dismiss for failure to state a claim, which the district court denied.

In a brief ruling the court held that Taylor had adequately set forth a claim because he had informed prison officials of his need for special meals yet they did nothing to correct the problem. The court held that when prison officials are aware of a diabetic's need for a special diet and fail to provide it, they show deliberate indifference to the prisoner's serious medical needs. Readers will note this is not a ruling on the merits, the court simply stated that Taylor had set forth a claim to which he would be entitled to relief if the facts he claims are proven to be true. See: *Taylor v. Anderson*, 868 F. Supp. 1024 (ND ILL. 1994). ■

Trial Required on Clothing Claim

When prison guards apply force maliciously and sadistically, they are violating the eighth amendment and can be held liable for their actions. Courtney Wilkens is a Missouri state prisoner. Prison guards claimed Wilkens was wearing gang colors in the prison dining hall and attempted to reprimand him. Wilkens and two other prisoners asserted his right to wear a bandanna which resulted in an altercation that Wilkens did not participate in. A half hour later Wilkens was taken to an office where guards demanded that he give a statement exonerating the guards in the dining room incident. Wilkens refused and the guards slapped him, jerked on his handcuffs and hit him in the back of the head. A prison supervisor ordered guards to "place Wilkens' 'stinking black ass' in detention." Wilkens spent the next 22 hours naked in a segregation cell with unclean bedding, poor lighting and no blankets. While in the segregation cell for the 22 hour period various prison

guards came in to hit, slap and slam him, jerk his handcuffs, and one guard inserted his gloved fingers into Wilkens' rectum. Wilkens filed suit claiming that this conduct by prison guards violated his eighth amendment rights.

The district court agreed and held that a jury reviewing Wilkens' claims could easily conclude that the assaults did occur and were inflicted maliciously and sadistically to cause harm. The court denied the defendants' motion for summary judgment and ordered a trial on the assault claims. The defendants claimed they were entitled to qualified immunity on the claim that Wilkens was kept naked in the segregation cell for 22 hours and appealed.

The court of appeals for the eighth circuit affirmed the denial of qualified immunity holding that when injury occurs during the course of strip cell confinement, immunity is not proper. The court discusses numerous cases which discuss prisoners' right to cloth-

ing and where prisoners were placed in strip cells. The key issue in the court's analysis was that the deprivation of clothing allegations incorporated the assault allegations. "The facts, as asserted by the plaintiff, recite a continuous course of mistreatment that includes the strip cell detention, beatings at the hands of several prison guards, the indignity of having a prison guard run his finger into the plaintiff's rectum..., as well as other indignities."

The court held that the entire scenario, including the clothing deprivation, supports a jury question of whether force was applied maliciously and sadistically to cause harm or in a good faith effort to restore order and maintain discipline. The jury would have to consider both the excessive force and the denial of clothing claims together in order to reach a verdict. The court affirmed the denial of qualified immunity and remanded the case back to the district court for a trial on the merits. See: *Wilkens v. Moore*, 40 F.3d 934 (8th Cir. 1994). ■

Ohio Prison Activist Conference

On April 29th and 30th, 1995, prison activists from around the state attended the Ohio Prison Activist Conference. The theme was "Struggling on the Outside for Those Struggling on the Inside." This conference was organized by Oberlin Action Against Prisons (OAAP) working in conjunction with the Ohio Criminal Justice Program of the American Friends Service Committee (AFSC) in Dayton.

The purpose of the conference was to determine who all are presently fighting for reform and abolition of prisons and in the criminal injustice system, and to determine how all could network resources and energies for common goals.

Attending the conference were multi-diversified representatives ranging from the AFSC Criminal Justice Program to the Revolutionary Communist Party. Speakers included: Civil rights attorney Nicky Schwartz, who negotiated the surrender of the Lucasville brothers after the 11-day siege at the Southern Ohio Correctional Facility in April, 1993; Hal Pepinsky, board member of the Center for Advocacy of Human Rights and professor in the Department of Criminal Justice at Indiana University; Alan Prendergast, journalist and Kiplinger Fellow.

These three discussed the conditions leading up to the Easter '93 uprising at Lucasville (SOCF), the economics of prisons as industries, the present public hysteria toward crime, the conditions and factors leading up to Control Units, and the call for a Super-Max in Ohio.

A workshop on Synthesis and Networking was held to develop strategies for building a more expansive and effective network of Ohio prison activists. It was decided that OAAP would plan another conference for October '95 rather than waiting a whole year until next spring. Discussions were held on changing public opinion, researching litigation, and organizing demonstrations.

All in all, the conference was a success in that it established a viable network in Ohio for all groups and individuals to share information, and in doing so, become more effective. One of the issues highlighted is the need to draw energy and direction from those inside. In turn, those of us inside must accept the responsibility to initiate contact and actively assist those on the outside who are working with and for us. Too few prisoners want to take these steps, preferring to stay out of the way and just accept what's meted out to them.

There will be another Ohio activist conference sponsored by OAAP and the Dayton AFSC at Oberlin College on October 28-9, 1995. We ask interested activists to attend to share ideas to fight the supermax as well as other projects. For more information call Jana Schroeder, AFSC Director, 915 Salem Ave., Dayton, Ohio 45406-5879. Phone: (513) 278-4225. Fax: (513) 278-2778. Arrangements are being made for transportation.

Also, any groups or individuals who have been lobbying or litigating women prisoners health issues, write John W. Perotti, SOCF 167712, PO Box 45699, Lucasville, OH 45699-0001, who is in contact with the National Womens Health Network in DC which is compiling information on womens health problems for coordination of lobbying efforts.

[Editor's Note: Are you imprisoned? Do you like it there? What have you done this week, this month, this year to do something about not only your own imprisonment, but the political conditions that pave the way for a generation of poor schmucks coming up behind you? When was the last "Prison Activist Conference" in your state? Maybe it's time to do something. If not you, who? If not now, when?] ■

BOP Prisoners Must Exhaust Admin. Remedies

When seeking review of disciplinary hearings in the courts, prisoners should carefully consider what form of action they should initiate. Robert Nigro is a federal prisoner who was found guilty of drug use during urinalysis testing at a prison disciplinary hearing. Nigro filed an administrative appeal to the warden and regional BOP director challenging the results and sanctions of the disciplinary hearing. He had thirty days in which to file his last appeal to the BOP's general counsel and because he was late in doing so, that appeal was denied as being untimely. Nigro then sought a writ of habeas corpus in federal court which the court dismissed as being procedurally defaulted because the claims were not presented in a timely manner to the BOP's general counsel. The court of appeals for the ninth circuit affirmed.

The appeals court gives a detailed discussion of the BOP's administrative remedies for disciplinary appeals. The court held that when BOP prisoners fail to exhaust their administrative remedies within the BOP their habeas petitions challenging the disciplinary proceeding must be dismissed as being procedurally defaulted. Nigro argued that he had filed his appeal in a timely manner but the appeals court declined to extend the rule of *Houston v. Lack*, 487 US 266, 108 S.Ct. 2379 (1988), which allows for late filing of court documents, to administrative appeals. The court gives an extensive discussion of the various cases concerning the timely filing of court documents and administrative appeals. See: *Nigro v. Sullivan*, 40 F.3d 990 (9th Cir. 1994).

Readers should note that while habeas corpus petitions require an exhaustion of state judicial remedies (for state prisoners) or administrative remedies for federal prisoners, § 1983 and *Bivens* actions seeking money damages do not. Readers should consider what action they intend to file, and research it, before they begin the administrative appeals process. ■

News in Brief

Ohio: On July 10, 1995, Lonnie Stuckey, 35, a former prison guard at the Ohio Reformatory for Women was convicted on six counts of sexual battery for having sex with female prisoners in his care. At his trial Stuckey claimed he had a consensual sexual relationship with a prisoner for four months. He was sentenced to six years in prison.

Russia: On July 7, 1995, two prisoners in the Altai territory of Siberia were charged with cooking and eating a fellow prisoner. The defendants, identified only as Gluzov and Maslich, are accused of strangling a 28 year old prisoner, cutting up his body, cooking parts of it over a fire made from a prison blanket and eating it. If convicted of the cannibalism charges the defendants face the death penalty.

GA: Charles Harrelson, 56, convicted hitman father of actor Woody Harrelson, and Gary Settle and Michael Rivers surrendered to guards at the US Penitentiary in Atlanta after a failed escape attempt. The prisoners tried to escape from the prison by climbing over a wall, they surrendered after guards fired a warning shot at them.

CA: On April 30, 1995, fourteen prisoners at the Los Angeles jail in Castaic escaped through a large hole in the ceiling of a 96-man cell. Jail guards charged with monitoring the cell were distracted by a fight in an adjacent cell. Ten of the escapees were recaptured in a matter of hours after an intense manhunt.

Brazil: On June 20, 1995, a riot broke out in the Hortolandia prison, near Sao Paulo. The riot started when prison guards began searching cells for weapons and the prisoners opened fire on them. At least six people died in the fighting, including the warden and a guard on his first day at work. More than 200 riot police stormed the prison and regained control on June 22, 1995.

PA: State attorney general Ernie Preate pleaded guilty in federal court on June 13, 1995, to charges of mail

fraud. Preate admitted in court that he filed fraudulent campaign finance reports with the state in order to conceal illegal contributions from video poker operators. As part of the plea bargain Preate agreed to resign from office on June 23, 1995. Preate is a Republican.

FL: Citing an increase in prisoner attacks on guards at the Martin Correctional Institution prison officials in April, 1995, introduced armed guards within the prison's security compound to suppress prisoners. The prison warden, Tom Crews, said he was talking to his staff to learn a reason for the increase in attacks. Crews said one reason for the increase was the number of prisoners serving longer sentences at MCI since prisoner gain time and early release time was reduced last year. MCI prisoner Michael Costello, a noted jailhouse lawyer, filed suit blaming the increased hostility at MCI on a reduction in prisoner privileges. Costello said the introduction of shotgun wielding guards to the prison was an overreaction to an April 14, 1995, protest by prisoners.

MA: Henry Marshall the 3rd, a former biker from Boston, was released early from the MA prison system at the FBI's request in order to serve as an informant. While in Washington state as a snitch he murdered Denis Griswold in Tacoma during a robbery. Griswold's widow filed a wrongful death suit in Boston on May 25, 1995, against the FBI for \$5 million and the state parole board for \$100,000 for releasing Marshall knowing he was dangerous, with over 23 prior convictions including two for attempted murder. Another case of a snitch gone bad.

WA: Island County District Judge Merle Wilcox has been accused by the state Commission on Judicial conduct of sexually molesting minors, assaulting his wife, fixing traffic tickets and acting inappropriately in court. Wilcox has been a district judge since 1982. ■

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The Bottom Line:

California's Prison Industry Authority

by Willie Wisely

Imagine a half-billion dollar manufacturing company that uses slave labor, has little overhead, ignores state and federal laws regulating workplace safety, includes hazardous materials in the construction of its products, forces customers to buy those products under penalty of law, yet loses money. Now, imagine that this company is protected from bankruptcy and government interference. Protected be-

cause the government owns and operates the company. It's California's Prison Industry Authority. Why is this company still in business?

Some 41 other prison industry programs across the nation turned a profit in 1992-93. California's PIA lost \$1.4 million on sales of \$128.6 million. Florida, Texas, and North Carolina have the largest prison industries outside of California and compete with private businesses in the marketplace. Florida's PRIDE (Prison Rehabilitative Industries & Diversified Enterprises) program is a private, nonprofit corporation created by the Legislature in 1981. Unlike PIA, PRIDE doesn't employ civil servants.

PRIDE netted \$4 million on gross sales of \$77.6 million in 1994, and spent \$635,000 assisting paroled prisoners. Just 18% of PRIDE alumni return to custody. PIA spends virtually nothing to help parolees, and the recidivism rate in California is over 75%.

Although the Texas Industries Division is prohibited from making money on 30% of its output, the program has turned a profit every year since its inception in 1963. TID employs 7,500 prisoners from a prison population of 94,000. California's PIA uses only 6,800 prisoners out of a 130,000 total. North Carolina's prison industry made \$5.4 million on sales of \$51.2 million in 1994. But, PIA has lost money five out of the twelve years it's existed. And, of these four states, only California requires gov-

ernment agencies, schools, libraries, and hospitals to buy prison made goods.

From furniture to eyeglasses, PIA manufactured wares are poorly made, overpriced, and often delivered months late. Don Green, purchasing agent for California State Polytechnic University, Pomona, needed chairs for the new computer lab. He could have bought them from a local retailer for about \$58 each. However, California law forced him to order the furniture from the prison manufacturing empire. He waited a year for delivery, and paid twice the retail price. In 1994, state entities chose from 110 product lines and 2,000 items in the slickly printed PIA catalog, spending \$135 million on prison made goods. The only ones who seem happy with the *status quo* are the civil service shop foremen, supervisors, salespeople, and administrators who make an average of \$44,000 a year, much more than they could earn for similar jobs in the real world.

"It's a joke, absolutely, positively a joke. And everybody covers everybody's ass," said Leonard Greenstone, the lone dissident on the Prison Authority Board, in a recent Orange County *Register* interview. A black vocational instructor who didn't want to be identified for fear of retaliation described gross program mismanagement. "When I worked for PIA, my shop turned a profit. Pretty soon, I was warned to cut back on production. They told me it made the other supervisors look bad." Private business

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Bottom Line (continued)

people think the law forbidding state agencies and other divisions from purchasing commodities on the open market should be abolished.

"It's like the factory system under communist rule. The workers and supervisors got paid whether their products sold or not. There was no reason for them to build quality merchandise because they had no competition," said Joe Harrington, retired Longshoreman, from Costa Mesa, California. The California Constitution forbids prisons from competing with private enterprise. Yet, that's exactly what they're doing. "The complaints we hear are that (PIA) is in direct competition with California business. You can't deny that," Lynn Wright, Governor Pete Wilson's government purchasing expert conceded. The competition isn't quite fair because PIA has a protected market.

PIA administrators claim the law giving them a protected market is necessary because prisons aren't permitted to sell goods to the general public. They also claim their products are more expensive because prisoners are unskilled, illiterate, and require constant supervision. While it's true PIA is barred from selling directly to the public in California, they are aggressively developing markets in foreign countries. They sell blue jeans and prison denim jackets with "California Department of Corrections" stenciled on them in Dayglo orange to the Japanese. The PIA's excuses were considered by the Little Hoover Commission, a state watchdog agency, in a 1993 report.

In that report, prison industry managers also say outdated equipment, delays in processing orders for raw materials, the high turnover of prisoners, and random lockdowns by prison administrators further drive costs up and production down. The Commission was skeptical. "Despite these burdens, the inability of the PIA to routinely break even or post a profit is perplexing in light of the ability to set prices without fear of losing customers," their report concluded. One state lawmaker has proposed a change.

California Senator Richard Polanco authored Senate Bill 617. If passed into

law, the bill would free state entities from the requirement to buy only from PIA. They would be at liberty to find better deals in the private sector. On May 11, 1995, the measure easily won approval in the state Senate. Joined by Senator Dan Boatwright, Polanco demanded a probe of PIA's finances and operations by the state Bureau of Audits. That investigation is expected to begin soon. At the most, insiders anticipate the ouster of Dave King, General Manager of the Prison Industry Board, and executive staff loyal to him. But, mismanagement isn't the only problem with PIA.

Materials used in the manufacturing of furniture the prison industry sells to state schools and hospitals are dangerous, flammable, and destructive to the environment. For example, urethane foam is purchased by the PIA Furniture Factory at Tehachapi prison's maximum security IV-B Facility. The large sheets of foam must be cut to size for use in chairs and couches. Cutting urethane

foam in the unventilated shop poses a serious, potentially lethal, health threat to prisoners and civilian employees alike.

When the foam is cut with power saws, tiny particles are dispersed into the air. Trapped inside human lungs, these particles can be deadly. "Urethane foam particles are carcinogenic. And, after accumulating in the lungs, they can cause a condition similar to asbestosis," says John Dittenbaugh, a Captain with the Kern County Fire Department. The foam also bears a warning to consumers that it was manufactured with 1,1,1-trichloroethane, a substance known to destroy ozone in the upper atmosphere.

Urethane foam is also extremely flammable, and once ignited produces a toxic gas which can quickly overcome and kill anyone nearby. The California Furniture Association does not approve of the use of this foam in furniture. PIA ignores the danger, causing some employees to seek other jobs. "I'm transferring out of here," said a former PIA supervisor.

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Article Submissions

We solicit well written articles about prison legal issues, prison struggle, legislation that impacts prisoners and news about prison issues that may be of interest to a national readership. We are particularly interested in well researched legal analysis of specific prison rights issues. An article that provides a broad overview of case law on one specific issue, with case citations included, is especially helpful to our many readers who have little or no access to law libraries.

Please send only copies of clean, crisp typed or legibly printed material, as we cannot return manuscripts without a self-addressed stamped envelope. We reserve the right to make minor editing changes, but any major rewrites will be sent back to the author for approval before publishing.

Any submission we publish will be given a byline (unless otherwise requested) and the author will be awarded a one year gift subscription to *PLN*. Mail submissions to:

**Paul Wright #930783
P.O. Box 777
Monroe, WA 98272-0777**

or

**Dan Pens #279308
P.O. Box 888
Monroe, WA 98272-0888**

"My father died of emphysema, and I've seen too many people with suspicious coughs in the shop. That damn dust will kill you." Foam dust fills the air at Tehachapi's Furniture Factory, and many prisoners working there develop a chronic cough. After Captain Diffenbaugh warned that the dust could cause serious illness, prisoners demanded exhaust fans to remove the particles from the shop air. Instead, they were given disposable paper face masks with labels that read, "This is not a filter. Prolonged use may be dangerous to your health." Meanwhile, it's politics and deliberate indifference as usual.

Governor Wilson is officially neutral on Polanco's bill, but strongly committed to PIA. "Prison Industry needs to expand, not contract, these positive efforts toward providing job skills and lessening the financial burden of state prison costs," he said in a 1992 video message. But, because PIA uses obsolete equipment and outmoded techniques, prisoners don't learn practical skills needed in the workplace outside. PIA executives claim they save taxpayers millions of dollars by allowing prisoners to earn time off their sentences for working. According to the legisla-

tive analysis of SB 617, however, that's just not true.

The conclusion that prison industry saves tax dollars by allowing prisoners to earn time off is based on the false assumption those prisoners wouldn't find other jobs and earn time off anyway. The savings guesstimate also supposes the Department of Corrections would have to create other activities for prisoners. The Little Hoover Commission found that PIA really didn't save taxpayers any money at all. "Through the mechanism of forcing these departments to purchase from the PIA, the costs of dealing with inmates are shifted throughout the state government but are still paid by the same public-provided dollar that would cover costs if they were contained in the Department of Corrections budget." So, what's the bottom line?

The bottom line is, the PIA, like the Department of Corrections itself, has become a welfare system for its employees. The sole purpose of PIA, it seems, is to furnish employees with big salaries for little work. It's not concerned with helping insure prisoners stand a chance of success on parole. It's not concerned with producing well made goods or turning a profit, either. One lifer at Tehachapi

said, "Give me a year and I'd have this place making millions. Take that furniture factory out, and manufacture computer memory chips. Prisoners would gain job skills that are actually needed outside, and customers would get memory chips at prices comparable to Japanese chips." What a great idea!

But, PIA doesn't appreciate great ideas. And, Governor Wilson, counting on his base of faithful civil servants at election time will likely veto Polanco's bill just as he did other bills in 1991-92 aimed at reforming PIA. So, schools, already strapped for cash thanks to budget cuts, must continue to pay \$3.56 for plastic binders they could buy at a stationery store for \$1.55, and \$695 for conference tables that run \$279 at a furniture outlet. State hospitals will have chairs and couches in their waiting rooms made with highly flammable, toxic materials.

In a way, California's Prison Industry Authority is like the goose that laid the golden egg. As long as no one kills the goose, PIA employees, and the myriad vendors who make a living supplying the prison industry, continue getting the gold. The trouble is though, the goose is crapping all over everyone else. ■

From the Editor

by Paul Wright

Welcome to another issue of *PLN*. Some of you may have noticed some changes in last month's issue of *PLN*. We have recently undergone some of the biggest transitions in *PLN*'s history. First, if the format looked a little different that is because we have begun the transition to using a different type of desktop publishing software. For years we used Ventura and the volunteers doing the DTP have complained about problems with the program, so we have switched to Pagemaker which is proving to be a better program according to the folks who use it.

The other big changes have to do with Dan being moved to a different prison. On August 21, 1995, he was moved to Twin Rivers Corrections Center (TRCC), ostensibly because he has "minimum" custody. His address is listed on page two, please note that both the

prison he is at and the one I am in are the same village but they are different.

When *PLN* first started Ed Mead, the former co-editor, and I were at different prisons and we had to do stuff through the mail. So we are back to that situation again. It will not have any serious impact with regards to *PLN*'s content and form. Of course I have to put up with Dan complaining about "having to learn to write all over again with primitive instruments: pen and paper." But I'm sure he'll adjust. The biggest impact this has had is that Dan had been handling our mailing list. For any publication that goes out through the mail its most important link is its mailing list.

With some 1,800 subscribers handling the mailing list is a major task in and of itself. Dan is quite the computer whiz (unlike me) and he made a program custom designed for *PLN*'s mailing list. He put hundreds of hours into it and it

has served us well. We had always been concerned about having the mailing list in prison because it made *PLN* susceptible to the repressive whims of our captors but it was something that needed to be done in order to get the program written, tried out and debugged. Dan succeeded in doing that and we have turned over the whole mailing operation to Jason our latest volunteer. You're getting this issue of *PLN* because Jason has managed to learn our mailing list program and how to handle our mail, etc., with regards to your subscriptions. So welcome aboard Jason!

If you have any questions about any delays with regards to mail you've sent us about your subscription please bear with us on whatever delay you have experienced. Jason has been busy learning about computers, databases, doing data entry and the other things it takes to handle a relatively big database. In the long run this will make *PLN* better in

From the Editor (cont.)

that we have added a new volunteer and secured the mailing list.

You may recall that earlier we said we were going to expand to 24 pages once we hit 2,000 readers. We still haven't gotten to that point yet but we expanded because we have a big backlog of legal articles to print. We also ran out of Business Reply Cards (the cards that fall on your feet when you open *PLN*), so we decided to go ahead and print more with the new institutional rate on them, making it possible to increase our size. We are still working on increasing our circulation. On October 1, 1995, we got hit with yet another postage increase by the post office and the cost of newsprint has gone up 20% in the past ten months. Which means we need more money. So if you can afford it please send what you can, encourage friends and family to subscribe. All the money we get we put back into *PLN*, you're get-

ting what you pay for here. If our income doesn't match our expenses we will have to cut costs which means going back to fewer pages, cutting the number of trial and free subscriptions we provide, etc. Basically there isn't a whole lot of fat to trim at *PLN*, our main expenses are postage and printing and they are constant, and rising. So send what you can if you think *PLN* is worth supporting.

On another note, the last few issues of *PLN* have been pretty heavy with legal articles, the reason for that is that the courts have been cranking out a lot of relevant prison cases. But with limited space we have sacrificed on the news and commentary pieces a bit. We have always tried to remain responsive to what you, our readers want. What do you want in future issues of *PLN* in terms of content? Do you like the news, the legal blurbs, the commentary, the foreign prison stuff or what? Do you think our articles are too long, just right or not long enough? I have written most of the legal

blurbs since *PLN* started. Looking at old issues of *PLN*, when we only had 10 pages to work with, I was really brief. As we got more pages I got wordier even though I have tried to stay on point. One option is to dramatically cut down the space used in legal blurbs. What do you think of that? Basically we are in a battle to stay relatively timely and relevant as well as a source of reliable and useful information. We welcome any comments and suggestions from you, our readers, on how we can do that. We have expanded to 24 pages now and we don't have any fluff or space filler, i.e. no cartoons, graphics, puzzles, etc., inch for column inch we think we are one of the most informative publications around. So get back to us on how we can improve. Likewise, how we can increase our circulation and get more readers. What will make us more responsive to readers' needs and desires? Please pass this issue along to others when you're done with it. ■

AZ Chain Gangs Protested

When Arizona became the second state to reinstate the use of prison chain gangs, Donna Hamm wasn't going to allow it to happen without her voice of protest being heard.

On June 12, 1995, Ms. Hamm, a long time prisoner rights activist, *PLN* supporter, former judge and organizer for the prisoner rights group Middle Ground, grabbed a bullhorn, jumped in her car and drove to the roadside where prisoners were being paraded in chains for an ogling contingent of media. The prisoners were working alongside Wilmot Road, not far from the Arizona State Prison Complex in Tucson. She parked her car legally along the shoulder of the road, beyond a parked DOC truck with an armed guard.

Ms. Hamm twice refused requests from DOC hacks to move her car, telling them that she was legally parked and as a free citizen had every right to be there. The guards reported the incident to warden Sam Sublett, who ordered the Pima County Sheriff's office called.

Donna spoke to the 20 prisoner chain gang through a bullhorn for about

an hour with reporters present. After the media left, two Pima County deputies told her she was being placed into "administrative detention" while they handcuffed and pat-searched her. When the prisoners saw her being placed into handcuffs they sat down and refused to work. A second work crew inside the prison also sat down and refused to break rocks for the media contingent who arrived to collect footage of the spectacle.

Ms. Hamm was released after only a brief "administrative detention." She was told that if she returns to the chain gang site with her bullhorn, she will be arrested.

"I am going to exercise my first amendment rights," with a court order if necessary, she said. "I will not be intimidated by the Department of Corrections or, quite frankly, the Pima County Sheriffs Office." As we go to press, Ms. Hamm has already sued the AZ DOC and Pima County sheriff.

The kind of courageous activism demonstrated by Donna Hamm can be quite effective, but not when it is a lone voice in the wilderness of corporate media crime hype demagoguery. Arizona's tinhorn fascist governor, Fife Symington,

has since announced his intention to implement a program whereby the state's 121 death row prisoners will be put to work breaking rocks and digging holes.

Symington announced his latest scheme on the heels of a state supreme court stay of execution for death row prisoner Luis Mata. Symington made the announcement at a press conference, flanked by the parents of the woman Mata was convicted of killing.

"This is clearly a campaign speech aimed at getting votes votes," asserted Denise Young of the Arizona Capital Representation Project. She criticized Symington for turning a purely legal matter into a political issue, and for exploiting the victims of Mata's crime for political purposes.

Donna Hamm certainly merits the respect of prisoner activists everywhere for her valiant efforts on behalf of Arizona prisoners. It is also good to see that Arizona prisoners are asserting their human rights as well. Anyone desiring more information about Middle Ground and their newsletter should write: Middle Ground, 139 East Encanto Dr. Tempe, AZ 85281. ■

10,000 Kurdish POWs on Hungerstrike

Since 1984 the Kurdish people in Turkey led by the Kurdish Workers Party (PKK) have been engaged in a war for an independent socialist homeland. The Turkish government has responded with a brutal military and political campaign of terror and genocide, similar to that waged against Kurds in neighboring Iraq and Iran. Despite the opposition, the PKK has steadily grown stronger politically and militarily. One of the results of this ongoing war has been that literally thousands of Kurds are political prisoners and prisoners of war in Turkish prisons, subject to harsh and brutal treatment. Despite their conditions the prisoners continue their struggle against the American backed Turkish regime. PLN has long supported the PKK, its prisoners and its struggle. We recently received the following statement from PKK supporters:

"Since July 14, 1995, more than 10,000 POWs from Kurdistan have started an indefinite hungerstrike in Turkish prisons, using the only weapon they have, their bodies, to fight against the barbaric colonialist war of the Turkish regime and to struggle for peace for the Turkish and Kurdish peoples so as to put an end to the suffering of millions of people as fast as possible."

The hungerstriking prisoners have sent the following open letter to several international organizations. It states: "The United Nations and its affiliates, having the responsibility for the peaceful coexistence of the peoples of the world, are no doubt aware of the circumstances in our homeland, Kurdistan. We, the Kurdish people, as responsible members of the world community, wish to be treated fairly. We see you a voice of responsibility and reason and hence are making this announcement to you as we do with various worldwide organizations. Our people, having been denied status even as a colonized people, before the eyes of the United Nations is left to annihilation by this century's most vicious and barbaric regimes. What

Saddam saw fit to bring upon the Kurdish people has not yet left our conscience. Today, a similar savagery is being planned and executed by the Turkish regime in Kurdish lands. Our settlements are being destroyed, forests burnt, and all of our land is being systematically deprived of all life. Our people are being forcibly stripped from their lands and are condemned to die. Millions of our people are fighting disease and starvation as they flee their homeland. For those who migrate to the metropolitan areas, hunger, unemployment, and 'mystery killings' are new realities. Each day, new attacks are added to the special teams and counter-guerrilla savagery. Even the dead are not exempt from the torture which is rooted in racism and fascist aggression. Today's realities include the rape of young and old women, houses burnt, and villages destroyed. It is impossible to speak of human rights while a people, its culture, its language, and its history are being denied and systematically destroyed. While the whole world watches in silence, we cannot accept the death sentences being served upon our people.

"The Kurdish national liberation movement, under the leadership of the PKK, represents vast portions of Kurdish society and is taking shape with great difficulty and pains. This movement has proven that despite incredible odds, our people, having begun their liberation, will not rest until they are free.

"Common values which enhance people's security and peace must be supported throughout our region. We believe our people are contributing to this endeavor. We ask all organizations, including yours, to show greater sensitivity towards the wishes of our people. Especially since the spring of 1995, the dirty war aimed at exterminating our people rages unabated, despite the calls for a cease-fire issued by PKK leader Abdullah Ocalan.

"We are 10,000 war prisoners. In order to call attention to the suffer-

ing in our homeland, we shall begin an indefinite hungerstrike on July 14, 1995. We shall continue our resistance until serious steps are taken to remedy our concerns outlined below. We display our personal gift of life to underline our people's right to live. We hope and wish for change with this moderate step in our people's resistance.

"We seek the following: 1) In order to reach a political solution, calls made by PKK leader Abdullah Ocalan for a dialogue must be supported and encouraged; 2) Geneva Convention regulations covering combatants must be observed and enforced in Kurdistan; 3) Killing of civilians, summary executions, torture in prisons, and the burning of villages must come to an end; 4) All war prisoners in jails must be classified as POWs; 5) All military operations designed to destroy our people must be stopped; 6) Under the auspices of the UN and the Red Cross, committees must be formed and sent to monitor the war in Kurdistan and prison conditions.

"This dirty war and all killings can be stopped by common and cohesive action. We believe not in war but in an honorable peace. We hope that you share our views and we appreciate your understanding."

Kurdish PKK supporters across Europe have supported the prisoners' hungerstrike by launching their own hunger strikes, which had already claimed one life by August 1, 1995. A wave of firebombings has also struck Turkish government offices and business across Europe as people show their support. Anyone desiring more information about Kurdistan and the PKK can contact: Kurdistan Committee of Canada, 2487 Kaladar Ave, Suite 203, Ottawa, Ont. K1V 8B9, Canada. Tel. (613) 733-9634. E-mail: kcc@magi.com. More information on the prison struggle can be obtained directly from the Solidarity Bureau in Brussels, Belgium. Tel. 322-280-0654. ■

U.S. Supreme Court: Time on Bail Doesn't Count

The US supreme court has held that the time a defendant spends "released" on bail doesn't count towards completion of his/her sentence even if the "release" is under highly restrictive conditions that are tantamount to jail. Ziya Koray was charged with money laundering and after pleading guilty to the charge he was "released" on bail, pending sentencing, to a pretrial services agency. The conditions of the release required that he remain "confined to the premises" of a Volunteers of America community treatment center without authorization to leave for any reason unless accompanied by a government agent. While at the center he was subject to random drug and alcohol tests as well. Koray remained at the center for approximately 150 days until he reported to prison to serve a 41 month sentence.

Koray asked the BOP to give him credit for time served at the halfway house. The BOP refused, the district court denied relief and the third circuit, at 21 F.3d 558 (3rd Cir. 1994), reversed. The appeals court held that 18 U.S.C. § 3585(b), the statute which determines when federal prisoners begin their term of imprisonment, included time spent on restrictive bail conditions after conviction. The appeals court held that, contrary to the BOP position, a defendant subject to BOP rules and authority is not "released" and must be given credit for the time served in a halfway house. The appeals court ruling conflicted with those of other circuits interpreting this statute and the supreme court granted certiorari to resolve the conflict between the circuits.

In the 8-1 ruling written by chief justice Rehnquist, the court held that § 3585(b) requires that credit be given for time served under an 18 U.S.C. 3142(e) "detention order" but not for time served pursuant to an 18 U.S.C. § 3142(c) "release order," no matter how restrictive the conditions. The court also held that the BOP's interpretation, which appears only in a "program statement," or internal agency guideline, rather than in "published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment," was entitled to deference because it was

an "interpretive rule" and a "permissible interpretation" of the statute.

The court rejected Koray's contention that the plain meaning of the term "official detention" includes the restrictive conditions of his confinement, even though he was released on bail. Noting that prisoners serving the remainder of their sentences in halfway houses similar to the one Koray was confined in are in "official detention" the court made some distinctions. "Unlike defendants who are 'released' on bail, defendants who are 'detained' or 'sentenced' *always remain subject to the control of the Bureau*. See *Randall v. Whelan*, 938 F.2d 522, 525 (CA 4 1991). This is an important distinction, as the identity of the custodian has both legal and practical significance. A defendant who is 'released' is not in BOP's custody, and he cannot be summarily reassigned to a different place of confinement unless a judicial officer revokes his release... or modifies the conditions of his release.... A defendant who is 'detained,' however, is completely subject to BOP's control. And '[t]hat single factor encompasses a wide variety of restrictions.'... 'Detained' defendants are subject to BOP's disciplinary procedures; they are subject to summary reassignment to any other penal or correctional facility within the system,... and, being in the legal custody of BOP, the Bureau has full discretion to control many conditions of their confinement."

"It may seem unwise policy to treat defendants differently for purposes of sentence credit under § 3585(b) when they are similarly situated in fact—the one is confined to a community treatment center after having been 'detained' and committed to the Bureau's custody, the other is 'released' to such a center on bail." Justifying its ruling the court gave the rather ludicrous explanation that "To determine in each case whether a defendant 'released' on bail was subjected to 'jail type confinement' would require a fact intensive inquiry into the circumstances of confinement, an inquiry based on information in the hands of private entities not available to the Bureau as a matter of right. Even

were such information more readily available, it seems certain that the phrase 'jail type confinement' would remain sufficiently vague and amorphous so that much the same kind of disparity in treatment for similarly situated defendants would arise." Given the fact that it is the sentencing court which sets the terms of release on bail one would think the court would have little difficulty determining whether its restrictions or the place it orders the defendant "released" to constitute "jail type" conditions or not.

The court concluded Koray was not in official detention within the meaning of 18 U.S.C. § 3585(b) and was not entitled to credit for the time he served at the halfway house while on bail "release". See: *Reno v. Koray*, No. 94-790, 63 Law Week 4479, June 5, 1995. ■

Police Chiefs Scoff at Death Penalty

A poll of randomly selected 386 police chiefs in the US found that most believed the death penalty does nothing to deter crime. The poll found that only one percent of the police chiefs believed the death penalty should be a primary focus to stop violent crime. Many of the chiefs stated they thought the death penalty was a symbolic means for politicians to show they are tough on crime. It also prevents any focus on other areas that might reduce or prevent crime.

Asked what they thought would reduce crime 31% said reducing drug abuse, 17% cited creating jobs and improving the economy, 15% cited longer prison sentences, and 10% cited putting more cops on the street. Of the police chiefs surveyed, over 80% said they did not think murderers consider the range of possible punishments before they kill and two thirds stated they did not think the death penalty significantly reduces murders. ■

Delay in Dental Care States Claim

The eighth circuit court of appeals has reaffirmed the long-standing principle that delaying dental care for prisoners violates the eighth amendment. Ronald Boyd, a Missouri state prisoner, began suffering pain to his jaw on June 1, 1991. He requested to see a dentist. After receiving no response he filed another request on June 16. Boyd was seen by a dental assistant on June 17 after a guard called the prison medical unit; Boyd was given some Tylenol. On June 25, after still more requests for treatment, Boyd was given anti-biotics and a pain killer. On June 27 Boyd was examined by Dr. Knox who diagnosed an impacted wisdom tooth and infection in his mouth. Knox told Boyd he would not remove the tooth for another four to six weeks.

Despite continued complaints of pain and discomfort, Boyd's tooth was not removed until October 8, 1991. Boyd filed suit under 42 U.S.C. § 1983 claiming that the numerous delays in having

the tooth removed violated his eighth amendment right to receive medical treatment for his serious medical needs. Prison officials moved the lower court for summary judgment which that court denied. They then appealed claiming they were entitled to qualified immunity for their actions. The court of appeals affirmed the denial of summary judgment and qualified immunity with regards to the prison dentist but reversed with regards to several other defendants on the grounds that they were not personally involved in denying Boyd dental care.

The appeals court noted that government officials cannot be held liable for constitutional violations unless they are personally involved in the violation or when the supervisor's inaction constitutes deliberate indifference toward the violation. The court held that the supervisory defendants in this case were entitled to dismissal of the claims against them because they had disclaimed any knowledge or involvement in the mat-

ter with affidavits and Boyd had failed to produce any evidence showing otherwise.

Knox argued he was entitled to summary judgment because he eventually referred Boyd to an oral surgeon. The appeals court rejected this argument. "Despite Knox's knowledge of Boyd's pain and suffering, Knox waited three weeks to complete a referral form. A three week delay in dental care, coupled with knowledge of the inmate-patient's suffering, can support an eighth amendment violation under section 1983. *Patterson v. Pearson*, 19 F.3d 439 (8th Cir. 1994). Accordingly, we conclude that there is a genuine issue of material fact as to whether Knox exhibited deliberate indifference to Boyd's serious medical needs. Knox is not entitled to summary judgment on the issue of qualified immunity, and we affirm the judgment of the district court as to this defendant." See: *Boyd v. Knox*, 47 F.3d 966 (8th Cir. 1995). ■

WA Publisher Only Rule Challenged

In the February, 1995, issue of *PLN* we reported on *Sindars v. Riveland*, an unpublished ninth circuit ruling reversing dismissal of a Washington state prisoner's challenge to the Washington DOC's "publisher only" rule which mandates that all written materials be sent from the publisher. In a very similar ruling the ninth circuit has again, in an unpublished opinion, reversed the dismissal of a suit challenging the "publisher only" rule and a rule which requires all items received by prisoners to be paid for from their prison account.

Thomas Richey, a *PLN* subscriber at the Washington State Penitentiary (WSP), filed suit claiming prison officials had violated his first amendment rights when they refused to allow him to receive a package of three books sent from a bookstore in Scotland. The defendants had rejected the package because it had not been purchased with money from his inmate account and had instead been paid for by Richey's aunt. Both parties moved for summary judgment

and the lower court, magistrate Cynthia Imbrogno, dismissed the action holding the regulations in question were "reasonably related to legitimate penological interests."

The court of appeals for the ninth circuit reversed and remanded. "Richey raised a triable issue of fact as to whether the rule restricting the receipt of any item sent through the mail 'if items are not ordered and approved in advance through facility designated channels,' Department of Corrections (DOC) Policy 450.100 Procedure (A)(2)(t), and the publisher-only rule, DOC Policy 450.100 Procedure (E)(1), are reasonably related to a legitimate penological objective in view of the exception which provides that inmates may receive quarterly packages containing Bibles, religious books, textbooks, diaries, or journals directly from family and friends, DOC Policy 450.100 Procedure (F). The district court's order does not address this argument."

"This issue is material, ... because the lack of a reasonable relationship with a valid penological objective would be fa-

tal to the rule restricting the receipt of any item sent through the mail if items are not ordered and approved in advance through facility designated channels and the publisher-only rule.... Furthermore, this issue is genuine, ... because the exception which provides that inmates may receive quarterly packages containing Bibles, religious books, textbooks, diaries, or journals directly from family and friends might permit a reasonable jury to conclude the other policies are 'arbitrary or irrational,' ... or represent an 'exaggerated response' to legitimate penological concerns."

Because this is not a published ruling readers are reminded it should not be cited as controlling precedent. We present this and other unpublished rulings so that readers will be aware of developments that may affect them. We encourage readers to send us rulings resulting in prisoner wins, even if unpublished. See: *Richey v. Spalding*, 1995 WL 72390, 48 F.3d 1228 (9th Cir. 1995). ■

Book Reviews

Loompanics Unlimited

Loompanics modestly bills itself as "the best book catalog in the world." If it's not the best it is certainly the most diverse, having all the books you've heard about but probably haven't seen in the neighborhood bookstore. Loompanics is a publisher and vendor that pushes the first amendment to its limit. Their large book catalog, an entertaining and informative read in and of itself, has books on every topic imaginable, including: how to clear a criminal record, everything you wanted to know about prison, freelance writers handbook, how to make improvised explosives and weapons, lockpicking, drug manufacture, solar energy, self publishing, fake ID, atheism, survivalism, finding information, getting even, anarchy, smuggling, economics, sex, camouflage, military and paramilitary manuals, guns, weapons, privacy, mass media, guerrilla warfare, health and medicine and lots, lots more.

If you're interested in any offbeat, underground or unusual topics then Loompanics probably has it. Their catalog is available for \$5.00 from: Loompanics Unlimited, P.O. Box 1197, Port Townsend, WA. 98368. 1-800-380-2230. ■

The Citebook

Review by Paul Wright

The *Citebook* is a 275 page book written by Tony Darwin designed to help laypersons help themselves in researching their litigation. Now in its eleventh printing the book is organized by subject and gives a brief description of relevant cases. This book is in a category of its own. While the *Prisoners' Self Help Litigation Manual* describes prisoners' rights and tells you how to litigate your claims, this book only lists case law, hence the title.

Its main usefulness will be to litigants who need a quick starting point in their legal research. While it contains a great deal of criminal and prison related cases the book contains citations of case

law relevant to citizens interested in knowing what their rights are in a variety of situations: consumer protection, bankruptcy, credit agencies, landlord tenant, insurance, IRS, workers compensation, real estate, etc. Prisoners will find useful the chapters dealing with habeas corpus, parole, prison regulations, sentencing, mail censorship, pro se complaints, cruel and unusual punishment, disciplinary hearings and much more.

While this book is not intended to replace more extensive case law digests it provides a handy reference source. It is also easy to read and gives a brief synopsis of relevant cases. The book contains useful appendices listing all federal courts, federal agencies and federal prisons. I bought a copy of the book several years ago and would do so again. Cost is \$27.45, including shipping. Contact: Starlite Inc., P.O. Box 20004, Dept. 34, St. Petersburg, FL. 33742. 1-800-577-2929. Starlite also sells a variety of other self help books. ■

US Prison Population Report

According to the Department of Justice the American prison population has grown more than 2.5 times between 1980 and 1993. As of 1993, the latest year statistics are available, 2.6% of the US adult population, 4.9 million adults, were on parole, probation, in prison or jail. This represents an increase of 3 million people since 1980.

During this time period the percentage of black prisoners increased from 46 to 50%, the Hispanic prison population grew from 7.7 to 14.1% while the general population increase for these groups was 11.8 to 12.4% and 6.5 to 9.5%, respectively. As of 1992 there were 4,094 black male prisoners per 100,000 black adults in the population, versus 502 white male prisoners per 100,000 adult white males in population.

In 1992 almost one in three of state prison admissions were parole or probation violators, compared to 1 in 6 in

1980. This and much more information is contained in the DOJ's latest 180 page booklet on this topic. It also includes extensive information of death sentenced prisoners, trend data, state by state data and more. Copies are available for free from: BJSC, P.O. Box 179, Annapolis, MD 20701-0179. Ask for *Correctional Populations in the United States, 1992*, NCJ 146413. ■

Jail Population Report

Like the prison population the nation's jail population has soared in recent years, overshadowed by prison crowding. According to a recent Department of Justice report, *Jails and Jail Inmates 1993-94*, the national jail population was at an all time record high of 490,442 detainees as of June 30, 1994. Jails operated by cities and counties house about one third of all prisoners in the US. In 1983 the nation's jails held 223,551 detainees. The number of jail prisoners per 100,000 adult US residents has increased from 130 in 1983 to 251 in 1994.

It is interesting to note that while the jail prisoner population increased by 106% the jail staff increased by 156%. The national jail population was at 97% of its rated capacity. Obviously this is misleading as some cities are massively overcrowded while small towns frequently have empty cells. Jails with a capacity of 1,000 or more prisoners were at 111% of capacity while those with less than a 50 prisoner capacity were at 67% of capacity. Whites made up 39% of the jail population; blacks made up 44%; Hispanics made up 15% and other groups made up the remaining 2%. For local jails the incarceration rate for blacks is six times that of whites. The total number of women jail prisoners was 48,879 in 1994.

One thing that stands out is that according to this report slightly more than 50% of all jail detainees are pretrial detainees who are unconvicted of any crime, too poor to post bail while the other half is convicted and either serv-

ing a sentence or awaiting transport to prison. Jails generally hold the unconvicted and those serving sentences of less than one year. Almost \$10 billion a year is spent operating the nations jails, even though, when adjusted for inflation, the cost of keeping jail prisoners has decreased 11% since 1983. Anyone desiring a free copy of this report which has a lot more information should write: BJSC, P.O. Box 179, Annapolis Junction, MD 20701-0179. ■

Strangeways 1990: A Serious Disturbance

Review by John Bowden

On 1 April 1990, the British prison system was shaken to its very foundations by an uprising of prisoners at Strangeways in Manchester; an uprising so prolonged and visible that it acted as a catalyst for wider prisoner unrest throughout the system and a focus for probably the most intense and far-reaching discussion and inquiry ever into the nature of the prison system in Britain.

Five years on much of the enlightened debate surrounding the causes of the Strangeways revolt, and virtually all of the recommendations to emerge from Lord Justice Woolf's inquiry into it, have now evaporated in a social and political climate of increased repression and the scapegoating of marginalised groups, including prisoners. Within five brief years the emphasis has radically changed from one favoring a genuine improvement in prison conditions and prisoners' rights to one favoring instead a total eradication of those rights and a return to almost medieval conditions of confinement. The ideological pendulum is now swinging dangerously to the far right on the question of prisons and the lessons of Strangeways are fading quickly.

The recent publication of *Strangeways 1990: A Serious Disturbance* by Nicki Jameson and Eric Allison is, therefore, a timely reminder of those lessons and, on this fifth anniversary of the revolt, a fitting tribute to all the prisoners at Strangeways who, by their magnificent collective action, blew the whistle on prison brutality in Brit-

ain and then suffered savagely as a consequence. Jameson and Allison have written an extremely well researched and powerfully analytical account of the revolt that contextualises the actions of the "rioters" in the hellish conditions and fabric of the prison system, as well as the social and political forces which determine the character of repressive prison regimes. Throughout the book the point is made that the actions of the Strangeways prisoners were a legitimate and absolutely justifiable reaction to the institutionalized brutality and maltreatment of the prison system.

This is very much a politically committed book, written from the perspective of the prisoners themselves; a book which bravely and unambiguously takes sides and gives voice to the voiceless, providing an extremely valuable testament to the historical struggle of the totally powerless against the omnipotently powerful.

Here also is a very gripping and absorbing human drama, a dynamic tale of resistance and heroism told with great compassion and empathy, and an uncompromising commitment to discovering and revealing the truth of what happened at Strangeways and why.

As with all potent displays of working class resistance, inside or outside prison, the state and a compliant media tried to drown the Strangeways revolt in a sea of disinformation and lies. The "ringleaders" were characterized as "animals" and "jail scum" etc. and their actions as an "explosion of evil" and an "orgy of violence". Layer upon layer of media and establishment lies were applied in an attempt to criminalise the Strangeways revolt and condemn its alleged ringleaders to additional years of imprisonment and victimization. The authors of *Strangeways 1990* are therefore to be congratulated for writing a courageous and truthful book that dispels completely the official mythology that surrounds Strangeways and instead places the revolt in its true context as a legitimate struggle against intolerable state violence and repression.

Solidarity is a strong and enduring theme throughout this book and both authors write from a clear position of active commitment to the prison struggle, infusing their work with a vibrant and campaigning energy. Here is a book that

seeks radical change in and a calling to account of an inhuman prison system, and by doing so provides prisoners with a potent weapon of liberation.

Strangeways 1990: A Serious Disturbance by Nicki Jameson and Eric Allison was published on 6 April 1995 by Larkin Publications, BCM Box 5909, London, WC1N 3XX, England (GB), telephone 0171 837-1688, fax 0171 251-3443, price £7.95 (sterling) plus £2 postage and packing. ISBN 0 905400 18 6. 192pp. Paperback. ■

South Africa Bans Death Penalty

On June 6, 1995, the Constitutional Court of South Africa issued a ruling banning capital punishment in that country. The court was established earlier this year to interpret South Africa's new constitution, the first to guarantee equal rights for all citizens. During the negotiations that led to the apartheid regime surrendering political power while being allowed to keep its economic wealth, the issue of capital punishment could not be resolved. So instead of being mentioned in the new constitution it was left up to the courts to decide. The African National Congress Party, led by Nelson Mandela, was opposed to the death penalty because in the past it had been used almost solely against blacks and was frequently used against ANC members and other political activists during the long struggle against the apartheid regime.

Chief Justice Arthur Chaskalson delivered the ruling for the eleven member court which held that the death penalty was inconsistent with the constitutional right to life. The ruling will benefit a total of 453 prisoners currently sentenced to death. Their sentences will be commuted to life in prison. Since the ANC took office South Africa has been faced with a crime wave in large part due to the fact that economic conditions of the black majority have not changed. An average of 50 people were murdered every day last year throughout the country. ■

Detainees Entitled to Exercise and Law Library

Pretrial detainees, like convicted prisoners, retain a right of access to the courts and to outdoor exercise. Jim Housley was a pretrial detainee in the Custer County jail in Oklahoma. He filed suit under 42 U.S.C. § 1983 claiming that his constitutional rights were violated when he was denied all access to legal resources during his six month confinement and only allowed 30 minutes of out of cell exercise during a three month period. The district court dismissed the case for failing to state a claim under Fed.R.Civ.P. 12(b)(6). The court of appeals for the tenth circuit reversed and remanded.

The appeals court noted that prisoners have a constitutional right of access to the courts. This applies to pretrial detainees in county jails as well. "We recognize that there may be cases where a prisoner is denied access for such a

short time that prejudice would have to be shown, otherwise dismissal would be appropriate. However, this alleged six month denial of all access is not so *de minimis* as to require an exception to the general rule. 'A prisoners' constitutional right of access to legal resources is not conditioned on a showing of need.'" These rights were well established when this case arose.

Likewise, Housley stated a claim on his denial of exercise claim. "Although we have never expressly held that prisoners have a constitutional right to exercise, there can be no doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the eighth amendment." The court held that Housley clearly had a right to at least some outdoor exercise while held in the

jail. "We recognize... that what constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates."

The court also reversed the district court's dismissal of two of the defendants on grounds of qualified immunity. The appeals court held that because the above rights were so well established at the time of the violation that the defendants were not entitled to qualified immunity for their actions. "A reasonable sheriff and jailer must remain apprised of major constitutional developments concerning inmates' rights." [Editors' Note: *Subscribing to PLN is one way to do this!*] The case was remanded back to the lower court for further proceedings. See: *Housley v. Dodson*, 41 F.3d 597 (10th Cir. 1994). ■

No Immunity for Hearing Officers

Prison officials who hear and decide prisoners' administrative appeals from disciplinary hearings are only entitled to qualified immunity for their actions. Jerry Young is a New York state prisoner. He was found guilty of misconduct at five separate prison disciplinary hearings and sentenced to segregation as a result. He administratively appealed each guilty finding to Donald Selsky, the Director of the Office of Special Housing and Inmate Disciplinary Programs for the New York DOC. Selsky denied each appeal. Young filed suit in federal court claiming that his due process rights had been violated at the five hearings when the hearing officers refused to allow him to call witnesses on his behalf. He named only Selsky as a defendant. The district court dismissed the suit holding that Selsky was entitled to absolute immunity from suit.

The court of appeals reversed and remanded. This ruling is very important for New York readers because until now the district courts in the second circuit were divided on the issue of whether or not Selsky, who hears all serious infraction disciplinary appeals in the New York state DOC, was entitled to absolute immunity. The appeals court held that

Selsky was not entitled to absolute immunity and cites numerous district court rulings affected by this decision

The court gave an extensive discussion of the doctrine of absolute immunity and notes that historically absolute immunity is rarely granted. For example, judges enjoy absolute immunity from damages for acts committed in their judicial capacity. Government officials are traditionally entitled to only qualified immunity from suit, which means they are liable for money damages if they violate well established constitutional rights. In *Cleavinger v. Saxner*, 474 US 193, 106 S.Ct. 496 (1985) the supreme court held that as a general rule prison disciplinary hearing officials were only entitled to qualified immunity because they were not independent nor insulated from being influenced by their superiors.

Applying *Cleavinger* to the facts in this case the court agreed that the same lack of procedural protections and independence that were found persuasive in that case apply here. Specifically, Selsky gives prison staff members advice on how to conduct disciplinary hearings, including those on which he will later decide on appeal. He is also not independent because he serves at the pleasure

of his superiors. His supervisor also supervises prison wardens who are likely to complain about any rulings they dislike, which are conveyed to Selsky through his work evaluations. The court concluded Selsky was "not truly independent."

The court also notes procedural defects may not be cured on administrative appeal. Furthermore, while prisoners may seek a state court review of a disciplinary ruling, they cannot recover money damages for any harm they may have suffered. "In sum, taking into account the presumption against absolute immunity,... and a defendant's corresponding burden in seeking to justify it,... we believe that the scale tips against defendant's claim of absolute immunity. We have no hesitancy in stating that this is far from an easy case and that the factors that influence us most are the lack of a sufficient guarantee of defendant's independence and insulation from communication with hearing officers about specific cases. Should this change in the future by restructuring defendant's position or by other means, the result might well be different." The case was remanded to the district court for further proceedings. See: *Young v. Selski*, 41 F.3d 47 (2nd Cir. 1994). ■

7th Cir. Clarifies “Deliberate Indifference” for Medical Cases

To state an eighth amendment violation, prisoners must do more than claim mere negligence by prison medical staff. Willie Sellers was a federal prisoner held at the infamous penitentiary at Marion. He is also a diabetic. He filed suit claiming that prison officials violated his eighth amendment rights by showing deliberate indifference to his serious medical needs when they placed him in a small cell, denied him an extra mattress, and wrongly administered his insulin. He also claimed that he was taken off of a special diabetic diet in retaliation for his complaints and the diet he was then given was too high in saturated fats and too low in calories to be healthy for him because diabetics are prone to coronary artery disease, and Sellers had already had a heart attack and by-pass surgery. The district court dismissed his claims and Sellers appealed.

The court of appeals, in a ruling by judge Posner, affirmed in part, vacated in part and remanded the case for trial. The court affirmed dismissal of the claims pertaining to the small cell, mattress and insulin, holding they had no merit in light of both previous court rulings and the “realities of prison administration.”

When the defendants filed their motion for summary judgment one of the affidavits was unsigned and unsworn. Sellers filed a motion requesting the court to strike the unsigned affidavit. The appeals court held that the lower court should have struck the affidavit but rejected Sellers’s claim that he did not have to file his counter affidavits until the district court ruled on his motion to strike. The appeals court held that affidavits are not pleadings and Sellers should have requested an extension of time in which to reply.

The court held that Sellers’s claim was valid in that his suit was dismissed because “...he did not receive the notice, as required by *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), in all cases involving unrepresented prisoner plaintiffs that failure to file counter-affidavits might result in the dismissal of the suit

— that he could not rest on his complaint once the defendants moved for summary judgment and supported the motion with affidavits or other evidence. But we do not reverse for failure to adhere to *Lewis v. Faulkner* unless there is reason to believe that the plaintiff was prejudiced by the failure, that is, that he could have established that there was a genuine issue of material fact, precluding the grant of summary judgment, if he had had a reasonable opportunity to submit affidavits.”

The court held that Sellers’s complaint regarding his diet had merit because diabetics are prone to dangerous weight losses. But that was a claim to be resolved at trial. In remanding the case, the court set forth the standard to be adhered to if Sellers is to prevail, noting that merely establishing that he had been denied appropriate medical treatment and diet would not prove that his eighth amendment rights had been violated because negligence is not actionable under the eighth amendment.

“Ordinary medical malpractice, therefore-malpractice that consists of negligent treatment-is not cruel and unusual punishment.... Neglect of a prisoner’s health becomes a violation of the Eighth Amendment only if the prison official named as defendant is deliberately indifferent to the prisoner’s health-that is, only if he ‘knows of and disregards an excessive risk to inmate’s health or safety.’”

“It is vital to keep negligence and deliberate indifference apart. It may be, as quite a large number of cases state, such as *French v. Owens*, 777 F.2d 1250, 1254 (7th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269 at 272 (7th Cir. 1983); *Kelley v. McGinnis*, 899 F.2d 612, 616-17 (7th Cir. 1990), and *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991), that repeated acts of negligence are some evidence of deliberate indifference-although an alternative explanation is that the prison may lack the resources to adhere to a reasonable standard of care, and it is an

open question whether that can be deliberate indifference. See *Wilson v. Seiter*, 501 US 294, 301-02, 111 S.Ct. 2321, 2325-26 (1991). And if it can, the prison officials, being unable to adhere to the reasonable standard of care, may have an immunity defense.”

The court held that it would be error to conclude that a series of negligent acts can be equated to an act of deliberate indifference. “The only significance of multiple acts of negligence is that they may be evidence of the magnitude of the risk created by the defendants’ conduct and the knowledge of the risk by the defendants.... If the cases we have cited meant to go further, they trip over the clear statement in *Farmer* that prison officials must know they are subjecting the plaintiff to an *excessive* risk before they can be found to be violating the Eighth Amendment. The more negligent acts they commit in a circumscribed interval, the likelier it is that they know they are creating some risk, and if the negligence is sufficiently widespread relative to the prison population the cumulative risk to an individual prisoner may be excessive. But, to repeat, the presence of multiple acts of negligence is merely evidentiary, it is not an alternate theory of liability. The occasional case that says it is, such as *Williams v. O’Leary*, 805 F. Supp. 634, 638 (ND ILL 1992), is simply wrong - wrong under *Farmer*, and wrong under the decisions of this court that anticipated *Farmer*, such as *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985) and *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991).”

The court noted that while Sellers can’t “bootstrap his way to a judgment by stringing together a bunch of separate acts of negligence, if he can prove that the defendants have deliberately withheld medical treatment and dietary accommodation that he needs-and that they know he needs-to avoid a diabetic crisis or another heart attack, he is entitled to judgment.” See: *Sellers v. Henman*, 41 F.3d 1100 (7th Cir. 1994). ■

Translators Required for Medical Interviews

Pretrial detainees and convicted prisoners held in the Kern County, CA jail filed a class action suit challenging the jail's use of padded safety cells for violent and suicidal prisoners and other jail conditions. The district court held that the "safety cells," consisting of bare cells with no furniture and only a grate covered pit toilet, violate no constitutional guarantees. The court issued an injunction requiring prison officials to develop a policy allowing prisoners in administrative segregation to exercise and have day room access together; and it requires jail officials to provide non-inmate translators for Spanish speaking prisoners seeking medical care. Both parties appealed and the court of appeals for the ninth circuit affirmed in part, reversed and remanded in part.

The appeals court affirmed the lower court ruling with regard to the "safety cells." The court held that use of the cells for short periods of time to protect suicidal prisoners was acceptable and did not violate the eighth amendment.

The court reversed the injunction regarding exercise for prisoners in administrative segregation (ad seg). Prisoners in ad seg retain all jail privileges such as visitation, phone access and exercise. However, they are held alone and have no contact with other prisoners for any reason. At trial the prisoners presented evidence that the isolation has adverse effects on them. The appeals court noted that in past rulings it held that administrative segregation, "even in a single cell for twenty three hours a day, is within the terms of confinement ordinarily contemplated by a sentence." Noting that the relief ordered by the court was "extremely reasonable and deferential to prison officials" the appeals court reversed it by holding that the conditions complained of did not rise to the level of an eighth amendment violation.

Jail officials objected to the lower court order requiring that they provide non prisoner translators for Spanish speaking prisoners during medical interviews. The court noted that this issue has

not been previously addressed by the ninth circuit. However, in *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) that court stated that failure to provide translators can constitute deliberate indifference to prisoners' serious medical needs. "An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of alleviation, can contribute to unconstitutional deficiencies in medical care."

The court affirmed the injunction which required "that a non-inmate translator, preferably a member of the medical staff, be made available upon an inmate's request." The injunction was consistent with a jail policy requiring a medical staff member to translate and a security staff member to translate if medical staff was not available. See: *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995). ■

Retaliatory Discipline Violates Due Process

A federal district court in New York has held that retaliatory infractions violate due process and that housing an asthmatic prisoner on an upper tier may violate the eighth amendment. Prison officials and detectives are also liable when they interrogate prisoners concerning crimes and do not provide counsel when requested. Cyrus McCorkle filed suit pursuant to 42 U.S.C. § 1983 claiming that New York state prison officials violated his eighth amendment rights by denying him a change of underwear for fifteen days; housed him on an upper tier despite a medical order stating he should be housed on ground floors due to asthma; denied a transfer to another prison despite a Mental Health Office order stating a transfer would reduce his stress and that he was exposed to TB while working in the prison hospital. He also claimed prison officials violated his due process rights by filing false disciplinary charges against him in retaliation for complaining about misconduct by guards. The defendants moved for summary judgment which the court granted in part and denied in part.

The court held that the denial of a transfer and clean underwear did not

state constitutional claims even if true. Likewise, there was no evidence that McCorkle had been exposed to TB while in the prison infirmary. However, the court held that McCorkle had stated a claim with regards to being housed on an upper tier despite defendants' knowledge of his asthma condition. "It is well known that climbing stairs exposes some people to serious medical risks." This claim was set for trial.

McCorkle claimed that a nurse filed false disciplinary charges against him, claiming that he had sought to bribe her to bring drugs into the prison, after he complained to prison officials that she was the nurse on duty when another prisoner almost drowned in the infirmary. He was found guilty at a prison disciplinary hearing and sentenced to a year in segregation. "Under *Freeman v. Rideout*, 808 F.2d 949, 951-53 (2nd Cir. 1986),... the filing of allegedly false disciplinary charges by state officers would not violate an inmate's due process rights as long as he was afforded a fair hearing where he had an opportunity to be heard. *Freeman*, however, does not apply to situations in which there are allegations

that an inmate's substantive due process rights were violated despite the fairness of the procedure used, *Grillo v. Coughlin*, 31 F.3d 53, 56 (2nd Cir.1994); *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2nd Cir. 1994); *Franco v. Kelly*, 854 F.2d 584 (2nd Cir. 1988)." The court denied the defendants' motion for summary judgment on this as well.

After the near drowning of the prisoner McCorkle was interrogated by prison officials and a homicide detective. There was no claim of any injury arising from the denial of counsel at the interrogation. However, the court noted that McCorkle had a right to counsel if the interrogation was custodial in nature and even if there was no injury he would be entitled to nominal damages if he prevailed.

The court also refused to dismiss McCorkle's claims that he had been denied his right of access to the courts and been assaulted by a guard. The court dismissed a claim involving the deprivation of property holding that New York state law presented an adequate post deprivation remedy. See: *McCorkle v. Walker*, 871 F. Supp. 555 (ND NY 1995). ■

Disciplinary Segregation Bars Criminal Prosecution

PLN rarely reports unpublished court rulings but we do so occasionally when such rulings have a news value to readers or state a novel legal theory. This is such a case. A superior court in Norfolk County Massachusetts has held that filing criminal charges against a prisoner confined to disciplinary segregation for the same offenses violates the state and federal constitutions' ban on double jeopardy. Recently the federal courts have been enlarging the scope of the double jeopardy clause. This has been most notable in the area of forfeitures where courts have held that criminal conviction and civil forfeiture of property constitute double jeopardy. See: *PLN*, Vol. 6, No. 4.

Caspar Forte was infraacted by the Massachusetts DOC and accused of blocking a guard from exiting a unit and assaulting two other guards who were attempting to restrain another prisoner. Forte was found guilty at a prison disciplinary hearing and sentenced to 28 months in the Department Disciplinary Unit (DDU) and 30 days of isolation. Forte was later indicted by the state on two counts of assault and battery on a prison guard. The indictment was based on the same incident as the disciplinary hearing. Forte filed a motion to dismiss the indictment contending that his sentence to the DDU was punishment for the purposes of double jeopardy. The court agreed and dismissed the indictment.

In his eight page ruling Judge Harold Flannery cited the Massachusetts statutes which hold that the purpose of the DDU is to punish and deter prisoners for misconduct. "The double jeopardy clause of the United States Constitution protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *United States v. Halper*, 109 S.Ct. 1892, 1897 (1989). It is the third of these protections at issue in this case."

In *Halper* the supreme court held that civil as well as criminal sanctions constitute punishment when the sanction as applied in the individual case serves the goal of punishment. "Punishment serves the twin aims of retribution and deterrence. ... which are not legitimate nonpunitive governmental objectives."

The court noted that a long line of state and federal cases across the nation have held that administrative discipline in prisons combined with criminal prosecution for the same offense does not constitute double jeopardy. See: *United States v. Rising*, 867 F.2d 1255 (10th Cir. 1989). While Massachusetts common law principles of double jeopardy may provide greater protection than required under the state or federal constitutions, in the past Massachusetts's state courts have followed other jurisdictions in holding that prisoners may be administratively sanctioned and criminally punished for the same offense.

The court held that the supreme court's ruling in *Halper* and the creation of the DDU to punish prisoners required it to dismiss the indictments in this case. "On the basis of these developments I find that an administrative sentence to the DDU plus a criminal prosecution for the same offense violates the prohibition against double jeopardy. While neither unmindful nor unsympathetic to the need for prison administrators to maintain order and discipline, which may include swift and sure punishment for major infractions of the rules, this need must be balanced against and is ultimately outweighed by constitutional and common-law protections against being punished more than once by the same sovereign for the same offense. The prison administration is not without recourse; but it must choose between administrative and judicial punishment."

Since Forte has already been sentenced to the DDU through the prison administrative process, a criminal prosecution violates his rights against double jeopardy. Therefore the motion to dismiss will be allowed." See: *Commonwealth v. Forte*, Norfolk Superior Court Criminal Action No. 97584. Dated March 8, 1995.

Readers should remember that this is an unpublished state court ruling that cannot be cited for purposes of precedent. Its main usefulness at this point will be to Massachusetts prisoners. Prisoners in other jurisdictions litigating this issue may want to try arguing this issue based on *Halper* knowing that at least one court has accepted this argument. Our thanks to Brendan McGuinness for sending us the ruling so we could inform our readers. ■

Cocaine Sentencing Disparities May Change

The Sentencing Guidelines Commission (SGC) is an independent body created by Congress in 1984 to reduce sentencing disparities in the federal court system. This has included creating sentencing guidelines which greatly restrict the discretion of judges in imposing sentences. In 1986 and 1988 congress passed laws mandating mandatory minimum sentences for defendants convicted of possessing or selling cocaine. However, in passing these laws Congress created a distinction between the powder form of cocaine and its crystalline form (AKA crack). Under the law, someone convicted of possessing five grams of crack receives a mandatory minimum sentence of five years. To qualify for that same sentence a defendant must be convicted of possessing at least 500 grams of powdered cocaine, this is known as the 100-1 ratio.

Numerous defendants have challenged the law for racial bias because statistical studies have shown that nearly 92% of all defendants convicted of crack possession are black or Hispanic but the bulk of those convicted of possessing powdered cocaine are white, which is leading to essentially race based disparities in sentencing. The 1994 federal crime bill directed the SGC to study the 100-1 disparity and make recommendations to congress.

On April 10, 1995, the SGC voted 4 to 3 to make crack cocaine sentences equal to those imposed for powdered cocaine. The proposal becomes law on November 1, 1995, unless Congress vetoes it. The SGC report stated in part: "While some aspects of drug use and distribution may justify a higher penalty for crack than for powder cocaine, the present 100 to 1 quantity ratio is too great." Chemically there is no difference between the two forms of cocaine. Rather, the crack form is popular among poor and minority drug users because it is cheaper (and more impure) than powdered cocaine.

Attorney general Janet Reno stated she opposed the SGC recommendation and would urge Congress to reject the proposed change. ■

Retaliatory Infraction Illegal

The court of appeals for the second circuit reaffirmed that infractions in retaliation for prisoners' exercise of constitutionally protected rights are unlawful. The court also noted that administrative dismissal of such charges do not bar § 1983 actions for damages resulting from punishment imposed at the defective hearing. Darnell Jones, a New York state prisoner, filed an administrative complaint against a prison guard for confiscating and destroying his property. The guard's supervisor threatened to retaliate against Jones. Jones's cell and that of a neighbor were searched and a shank was found in the other prisoner's cell. Jones's complaint alleges that the guards conspired to lie and state that they found the shank in his cell.

Jones was infraacted for the weapons possession. At the ensuing disciplinary hearing Jones asked that the prisoners in the neighboring cell be called as witnesses to confirm that the shank was theirs and not his. The hearing officer refused this request and found him guilty of weapons possession and sentenced him to 120 days of segregation and the loss of four months good time. Jones administratively appealed the matter and the appeal was denied. After Jones had served the sanction imposed a Prisoners' Legal Services assistant wrote to the New York DOC official, Donald Selsky, responsible for administrative disciplinary appeals pointing out the procedural defects in the hearing. Selsky reversed his earlier denial of Jones' appeal and expunged the infraction from Jones's record.

Jones filed suit under 42 U.S.C. § 1983 claiming that the retaliatory infraction and conduct of the disciplinary hearing violated his rights to due process. The district court dismissed the suit holding that the due process defects in the hearing were cured by Selsky's eventual dismissal of the infraction; that Selsky was absolutely immune from suit for damages and that the retaliatory in-

fraction claim failed to state a claim upon which relief could be granted. Jones appealed and the court of appeals for the second circuit reversed and remanded.

After the district court dismissed the suit the appeals court decided *Walker v. Bates*, 23 F.3d 652 (2nd Cir. 1994), holding that if a prisoner was placed in punitive confinement as a result of a procedurally defective hearing, his eventual success in an administrative appeal did not bar a claim under § 1983 for damages resulting from that confinement. The appeals court also decided *Young v. Selsky*, 41 F.3d 47 (2nd Cir. 1994), holding that Selsky, in his role as an appellate hearing officer, was not entitled to absolute immunity, though he might be entitled to qualified immunity. (See "No Immunity for Hearing Officers" on page 10 of this issue.) In this case the state conceded that these cases were controlling with regards to two of Jones' claims and asked that the appeals court hold this case in abeyance pending resolution of petitions for certiorari the state had filed with the U.S. Supreme Court. The appeals court declined to do so, noting that "A decision of a panel of this court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court."

The district court had dismissed Jones's retaliation claim holding that the assertion that false misconduct charges have been filed does not state a claim under *Freeman v. Rideout*, 808 F.2d 949 (2nd Cir. 1986) and that Jones's retaliation claim was "wholly conclusory." The lower court held that Jones had no factual basis for his retaliation claim "other than an adverse disciplinary ruling decision and its eventual reversal."

The appeals court vacated this ruling as well. In *Freeman* the court held "that a 'prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest...' we reasoned that the prisoner's due

process rights are protected if he is granted a hearing on the charges and given an opportunity to rebut them." The court noted that as a factual matter this case was distinguishable from *Freeman* because Jones was denied the right to call key witnesses in defense of the charges against him.

"At the doctrinal level, we have held that a prisoner has a substantive due process right not to be subjected to false misconduct charges as retaliation for his exercise of a constitutional right such as petitioning the government for redress of his grievances, and that this right is distinct from the procedural due process claim at issue in *Freeman*. See: *Franco v. Kelly*, 854 F.2d 584, 589 (2nd Cir. 1988)."

The appellate court held that the lower court made several errors in disposing of the retaliation claim. The court held that Jones had set forth sufficient facts in his complaint to support his retaliation claim. The lower court's determination was also premature and inappropriate on such a scanty record where, as in this case, no discovery had been conducted. "Even if Jones is unable in discovery to elicit direct admissions, his testimony that Armitage made retaliatory threats, together with evidence of the sequence of events alleged above would easily permit-though obviously not require-a trier of fact to infer that the filing of the false behavior report against Jones was an act of retaliation for his earlier complaint against Lavarnway. The determinations as to whether to credit such testimony and as to what inference to draw from the sequence of events is within the province of the factfinder at trial, not of the court on a motion for summary judgment." The appeals court remanded the case back to the lower court for further proceedings. See: *Jones v. Coughlin*, 45 F.3d 677 (2nd Cir. 1995). ■

Death Row Prisoners Keep Right to Contact Visits with Counsel

The court of appeals for the tenth circuit has held that condemned and maximum security prisoners held in an Oklahoma control unit are entitled to contact visits with their attorneys. The court also held that all violations of prisoners' constitutional rights require a full judicial review pursuant to *Turner v. Safley*. Death row and maximum security prisoners held in the Oklahoma State Penitentiary's (OSP) H unit filed a class action suit contending that the prison's ban on contact visits with counsel violated their right of access to the courts and their right to counsel. Attorneys also challenged an OSP policy which prohibited barrier free or contact visits, between these prisoners and examining psychologists and other medical professionals and legal counsel. The district court held that OSP policy violated prisoners' constitutional rights but determined that changes made during the litigation (installing a clear Plexiglas window to allow eye to eye contact and drilling a two inch hole to allow the exchange of papers) passed constitutional muster. See: *Mann v. Reynolds*, 828 F. Supp. 894 (WD OK 1993). [PLN, Vol. 5, No. 1] The court also discussed the plaintiff's request for attorney fees. [Editor's Note: Amnesty International has issued a scathing report on H Unit and its inhumane conditions. See: PLN, Vol. 5, No. 10].

The appeals court gave a well reasoned ruling which criticized the lower court's ruling. The lower court had granted declaratory and injunctive relief concluding that "non-contact visitation between attorneys and death row inmates is violative of the Sixth and Fourteenth Amendments to the United States Constitution," but it stopped short of declaring that full contact visitation without limitation between death row inmates and their attorneys is mandated by the Sixth or Fourteenth Amendments." The appeals court extensively quoted the district court's factual findings which include the facts that death row prisoners do not present any greater security risk than other prisoners. Most importantly, the finding "that OSP maintains an institutionally sanctioned attitude of hostility and opposition to attorneys who attempt to represent death row inmates.... The blanket adversarial position taken against OIDS attorneys representing death row inmates is apparent on this record and is unjustified."

The lower court was criticized for starting its analysis with *Turner v. Safley*, 482

US 78, 107 S.Ct. 2254 (1987) but not concluding it after finding that the no contact visit policy did not inhibit "meaningful access" to counsel. The lower court had noted that if it had relied on *Turner* the prison official defendants would have lost the case at trial. The appeals court noted that the sixth amendment does not require in all instances full and unfettered contact between a prisoner and counsel. "There are simply no cases presented to us in which courts have measured counsel's effectiveness by the strength of counsel's emotional bonds with the client." Attorney effectiveness is measured by courtroom representation. Despite this, the appeals court noted "we think the district court should have completed the project it started."

"Our first disagreement with the court is the conclusion there can be an acceptable impingement upon a prisoner's constitutional right which negates further inquiry under *Turner*. We do not read the Court's opinion to provide that latitude. As we read the Court's directives, *any* burden placed upon a prisoner's constitutional rights requires a federal court to take the next step to determine whether it is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns.... The relevant factors the Court set out to guide us in that inquiry are (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) what the impact accommodation of the constitutional right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an exaggerated response to prison concerns."

"In this case, the district court, in effect, found the restrictions to free access resulted in an impingement upon the Sixth Amendment right to which inmates are entitled, but concluded it was not sufficient to negatively affect that right. That conclusion, however, necessarily avoids the analysis of the very areas mandated by *Turner*, which in light of the district court's pronouncement the State 'would lose the battle' if that inquiry were made, underscores the very reason the court should have done so."

The court held that a *Turner* inquiry would have led the district court to rule in the prisoners' favor "because the record demon-

strates a lack of rationality in the denial of contact between inmates and their counsel. Indeed, having found the administration of OSP has permitted inmates unfettered personal contact with virtually all those with whom they interact *except* their lawyers, the court was required to take the next step."

The court was disturbed by the fact that the OSP defendants "have not provided an explanation why they singled out attorneys for the restricted contact." The defendants were unable to provide any evidence the restrictions on contact visits were reasonably related to prison security. "When this default is coupled with the overlay of the 'blanket adversarial' attitude of the defendants specifically toward OIDS attorneys and the lack of restriction on the contact between inmates and others, *Turner* suggests the limitation on contacts between lawyers and clients is not related to a legitimate penological interest." The court held that this failure by the defendants aligned the case with *Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1990) where the court struck down a ban on contact visits with attorneys. [Editor's Note: The court in this case gave only passing mention to *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993), PLN, Vol. 5, No. 2, where the ninth circuit upheld an Arizona DOC policy banning contact visits with counsel. Readers will note that *Ching* was also an Arizona case. This ruling appears to create a conflict within the circuits as to whether condemned and control unit prisoners have a right to contact visits with counsel. This issue may likely wind up in the supreme court.]

"Our analysis of the record indicates to the extent the State offered justifications for the OSP policy, the district court found the justifications without substance because the policy is randomly and arbitrarily applied. Indeed, it is even debatable whether any policy exists in the first instance." The appeals court affirmed the lower court's denial of stays of execution for some of the plaintiffs and reversed and remanded the case "with directions to enter an order invalidating the present restrictions on contact visits between all class members and their counsel in accordance with the views we have expressed in this opinion. The district court shall also reconsider the award of attorney fees to determine whether the amount should be increased as a result of this appeal." See: *Mann v. Reynolds*, 46 F.3d 1055 (10th Cir. 1995). ■

Asbestos Exposure States Claim

A district court in Massachusetts has held that a suit claiming exposure to asbestos states a claim for violation of the eighth amendment. County jail prisoners filed suit claiming they were exposed to "raw, open and dry asbestos fibers" on exposed pipes within the jail. The plaintiffs stated they had received copies of numerous Department of Health and Public Safety reports listing health code violations at the jail related to the asbestos covered pipes. They also claimed that despite the reports jail officials took no steps to protect jail prisoners from asbestos exposure. The defendants filed a motion to dismiss for failure to state a claim.

The district court noted that prisoners may bring an eighth amendment claim that environmental hazards in prison, such as exposed asbestos, pose an unreasonable risk of serious damage to future health. See: *Helling v. McKinney*, 113 S.Ct. 2475 (1993);

Powell v. Lennon, 914 F.2d 1459 (11th Cir. 1990); and *Smith v. Fiedler*, 867 F. Supp. 832 (ED WI 1994). "A well plead complaint of this variety should allege an objective component (was the deprivation sufficiently serious?) and a subjective component (did the official/s act with a sufficiently culpable state of mind?).... plaintiffs must plead facts which show a deliberate indifference to a risk of serious damage to their future health, specifically exposure to an unreasonable level of asbestos."

The court held that the plaintiff's complaint in this case met that standard because they alleged that there were free floating asbestos fibers in the prison environment. "It is significant that plaintiffs further claim that the presence of asbestos fibers violates state health codes and that the prison has been cited for these violations." "With respect to prison health hazards, state health codes reflect established public attitudes as to

what those hazards are." This established the objective component of the their claim.

"The allegations that prison officials knew for years that unacceptable levels of asbestos fibers contaminated living and eating facilities in the prison, if true, would undoubtedly show a deliberate indifference to a serious health risk." This established the subjective component of their claim. Readers should note that other courts have held that the mere presence of asbestos covered pipes in a prison, without more, does not violate the Eighth amendment. See: *McNeil v. Lane*, 16 F.3d 123 (7th Cir. 1994).

The court held that while the plaintiffs may not be able to prevail on their claim, at this stage of the proceedings they had met their burden of stating a claim upon which relief could be granted. See: *Gonyer v. McDonald*, 874 F. Supp. 464 (D MA 1995). ■

All Writs Act Limited

The seventh circuit court of appeals has given a narrow interpretation to the All Writs Act, 28 U.S.C. § 1651, by holding that a district court lacked the authority to order the Illinois DOC to transport a prisoner to a medical expert witness's office for an examination when the DOC was not a defendant. The case arose when Bobby Ivey slipped and fell in an Illinois county jail. He filed suit for the injury and lack of care he received thereafter. He was subsequently convicted and confined in the Illinois DOC. As his litigation progressed, his court appointed counsel requested an order that the DOC transport Ivey to the offices of a doctor retained to conduct a medical examination for the purpose of testifying as an expert witness at trial. The DOC objected to having to transport Ivey and appealed the order.

The appeals court gave an extensive discussion of the power of district courts to issue writs of habeas corpus for the purposes of bringing prisoners to court. The purpose of the All Writs Act is "a residual source of authority to issue writs

that are otherwise not covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 US 34, 106 S.Ct. 355 (1985). In that case, the Supreme Court held that a district court could order a state prison system to transport a state prisoner to testify in a federal trial.

In this case, the appeals court held that a district court lacks the authority to order the DOC to transport Ivey to Chicago to see the physician. The court noted that the DOC was willing to allow the physician to examine Ivey in prison. The court drew the analogy that prisoners have a right of access to their attorneys yet nowhere is it suggested that prisoners be transported to their attorneys' offices, therefore, why should a prisoner be brought to a doctor's offices? The court suggested that if expert testimony were essential that Ivey's attorneys should seek medical experts closer to the prison Ivey was housed in or offer to reimburse the Illinois DOC for the cost of transporting him

to the doctor. "The only question before us is whether a court may order a custodian to transport the prisoner outside the prison to acquire evidence in a suit to which the custodian is not a party. Under both § 1651(a) and § 2241(c)(5), the answer is no."

In a concurring opinion, circuit judge Rovner expressed her concern about the difficulties this decision will cause for prisoners requiring expert medical testimony. She points out that some tests can only be performed at outside medical facilities or may require specialized medical equipment. In the majority of prison medical cases the defendants will be DOC officials who have an interest in not allowing prisoner plaintiffs to develop their cases. Judge Rovner expressed her concern that Congress "has seen fit to provide such unfettered authority to potentially interested state officials, while at the same time depriving our judicial officers of any discretion to further the interests of justice in a particular case." See: *Ivey v. Harney*, 47 F.3d 181 (7th Cir. 1995). ■

Population Cap, Fines Affirmed

The court of appeals for the fifth circuit has affirmed a district court ruling which set population caps on the population of a county jail and imposed fines for each prisoner over the cap held at the jail. The court also affirmed the lower court ruling that the state was liable for the overcrowding by refusing to accept convicted prisoners into the state prison system. In 1975 prisoners at the Harris county (Houston) jail in Texas filed a class action suit challenging inhumane conditions of confinement. Since then the case has gone to trial and been up and down the federal court system several times with numerous published opinions along the way. A major institutional reform case, it will be of little use for individual litigants but extremely useful for those litigating class action suits involving jail conditions. It well illustrates the failures of the executive and legislative branches to resolve the problems of jail and prison crowding.

The appeals court gave an extensive factual background to the case. The litigation initially began in 1975 because the county jail was massively overcrowded resulting in inhumane living conditions for the detainees. Since then two additional jails were built which still didn't resolve the overcrowding. After a trial the original complaint was settled in a consent decree subject to monitoring by the court. The district court appointed several monitors to review jail conditions and assessed their costs to both the county and state defendants.

By 1987 the jail only exceeded its design capacity by five percent. Two years earlier the state of Texas had resolved its own overcrowding problem within its prison system by agreeing to limit its prisons to 95% of their design capacity. See: *Ruiz v. Estelle*. In order to stay within its agreement the state would periodically refuse to accept convicted prisoners from the county jails. Later, the state set quotas on how many prisoners it would accept from county jails. This led to a massive backlog of convicted prisoners awaiting transfer which pushed the Harris county jail defendants past their own population limits. The district court ordered the county to transfer at least 290 convicted prisoners to the state per week in order to comply

with the judgment in the case but the state refused to accept them. The case wound on as the county motioned the court to force the plaintiffs to sue the state as a defendant in this case and the state requested that the case be transferred to the court handling the landmark Ruiz class action suit against the Texas prison system.

In the meantime, the jail population grew. "To put this in some perspective,... Harris County now has more prisoners sleeping on the floor of its detention facilities than the total number of convicted offenders incarcerated in fourteen states." By 1989 the jail's population was at 189% of capacity, 45% of whom, more than 3,400, were transfer ready felons. The court appointed monitors told the court that jail conditions were "intolerable and shocking to the conscience."

At a merits liability bench trial in 1989 the district court found that conditions at the jail violated the eighth and fourteenth amendments. The court held both the county and the state liable for the constitutional violations at the jail. The court entered a series of orders designed to reduce the jail's population to something approximating its design capacity. After the county failed to meet those population caps the court ordered the release of more than 250 pretrial and convicted misdemeanants. Despite this, the jail's population continued to climb to well over 1,800 past its design capacity leading the court to conclude that "clearly the County and State defendants have not yet developed a feasible strategy for addressing the overcrowding problem in Harris County detention facilities that precludes the need for further release of inmates." After further orders failed to lower the population the district court issued an order requiring the defendants to pay \$50 per day for each prisoner over the jail's design capacity. The court also modified the population cap at all three of the county's jail facilities over the plaintiff's objections. All three parties appealed and the court of appeals for the fifth circuit affirmed in part, reversed in part and remanded.

The appeals court gave a lengthy discussion of federal court's power to hold parties in contempt and impose sanctions. Applying those principles the court held that the lower court had not erred in imposing the fines on the defen-

dants should they exceed the population caps imposed on the jail. The state's due process rights were not violated because they were given an opportunity at a hearing to argue why the fines should not be imposed. The appeals court also upheld the lower court order holding the state solely responsible for paying the overcrowding fines. Texas law makes the state responsible for convicted felons. The lower court had found that the "majority of the problems at the Harris County Facility result from the large number of TDCJ inmates which the State will not receive." Moreover, it was the state defendants who, through legislation, could resolve the problem but had failed to do so.

The appeals court affirmed the lower court orders requiring the state to fund all costs associated with the remedial plan except those falling within the traditional role of county detention facilities. The court held this was acceptable because of the state's responsibility for some of the unconstitutional conditions caused at the jail by overcrowding. The court also affirmed the district court's allotment of 90% of the monitor's costs to the state and the remaining 10% to the county.

The district court, on its own motion, modified the 1975 consent judgment entered into by the parties which governed numerous aspects of jail operation. The appeals court affirmed most of the modification as being allowed by law, to the extent the lower court sought to ensure that the decree's purpose, to ensure the constitutional conditions of the jail, were met. However, the lower court erred when it modified the constitutional capacity of three of the county jail facilities. The lower court set the capacity for all three facilities at 112.5% of design capacity and the appeals court noted there was nothing in the record to support this modification. The appeals court held it was not clear that the county could house any prisoners beyond its design capacity in a constitutional manner. This issue was remanded for further proceedings, namely, that the lower court make a finding that there had been a substantial change in circumstances warranting modification of the jail's constitutional capacity. See: *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995). ■

CBCC EFV Stabbing Trial

In the March, 1995, issue of *PLN* we reported that Todd Hiivala, a prisoner at the Clallam Bay Correction Center (CBCC) in Washington, stabbed his wife Heather several times during an Extended Family Visit (EFV) on January 7, 1995. Hiivala was shot by tower guard Doug Campbell during the stabbing after refusing orders to drop the knife. As a result of Hiivala's incident Governor Mike Lowry ordered a review of the state's EFV program and EFVs were ended for all close custody prisoners and several other categories of prisoners. All metal utensils were removed from EFV facilities. Hiivala decided to stab his wife two days before the legislature opened its 1995 session and after legislation to abolish the EFV program had already been filed.

Hiivala was charged with attempted first degree murder. The trial began in Clallam County Superior Court on August 1, 1995. Heather was attacked when she disclosed she had been unfaithful

(probably a good reason these things are best done over the phone or by letter). Heather refused to attend the trial despite prosecutors offering to pay her expenses. Hiivala was acquitted of the first degree attempted murder charge and convicted of second degree attempted murder. Hiivala was sentenced to life in prison without parole as a "three strike" defendant because of his prior criminal record. Hiivala had previously had a 2045 release date. Another CBCC prisoner John Bolton, already serving a sentence of life without parole for murder, is due to be sentenced under the three strikes law for having taken a CBCC counselor hostage.

Source: *Peninsula Daily News*, August 1 and 4, 1995. ■

Article Clarification

In the August, 1995, *PLN* our article *WA Passes Record Anti-Prisoner/Defendant Legislation* commented at length on House Bill 2010. We were somewhat skeptical of provisions within the bill that desig-

nated efforts to explore establishing a kosher kitchen at the Airway Heights prison near Spokane, WA for the purpose of supplying kosher meals to prisons across the US.

We were recently contacted by Gary Friedman, the *PLN* supporter who heads the International Coalition for Jewish Prisoner Services in Seattle. He informed us that he was among those who had lobbied for passing this law. The purpose of this is to be able to provide religious diets not only to Jewish prisoners but to Muslims, Seventh Day Adventists and others whose religions require special diets. We apologize for any misunderstanding this may have caused. Readers desiring more information on this subject can contact Gary at: Gary Friedman, ICJPS, P.O. Box 85840, Seattle, WA 98145. (206) 524-3813. Gary emphasizes that his organization supports the religious rights of all prisoners, not just Jewish prisoners. ■

Worked to Death: OH Work Release Programs

By Dan Cahill

Many of us have been concerned about the possibility of abuse and tragedy in the unprotected use of prison labor. Over the past several years Ohio legislators have made it legal to market prison labor to private companies.

One of the most recent tragedies involved the trash burning power plant in Columbus, OH. The Franklin County Workhouse on Jackson Pike, directly across the road from the trash burning power plant, supplied prisoners in a work release program to a private company, Shaneway. These work release prisoners were paid about \$5.00 an hour to separate metal from the ash stream with their hands, without any protective clothing or equipment. Work release prisoners were actually working right in the largest known source of deadly dioxin in the United States: the ash stream from the power plant.

Prisoners worked in toxic ash which contained arsenic levels 22 times those allowed by OSHA standards; cadmium

levels at 5 times; lead at 138 times; and dioxin at levels 770 times the ambient air in the community. All the work release prisoners working in the ash stream had visible skin problems consistent with symptoms of chloracne caused by dioxin exposure.

With the passing of Senate Bill 2 this year, the state will greatly increase the number of Community Correctional Programs, and will have an ever increasing number of prisoners available to anyone who wants to profit from this cheap labor. Prisoners in these work release programs, and even in state and federal prisons, need to be represented by an outside union to protect them from unscrupulous government officials and employers, who have already demonstrated that they are not concerned about subjecting prison laborers to toxic waste or other safety hazards.

Non-violent offenders serving short sentences of six months or less in county or city jails are a perfect marginal transient population for toxic labor. For the prisoners who worked at that

power plant, the relatively short sentences turned into a lingering death sentence.

These prisoners pay all regular taxes and deductions, and then are made to pay court cost, restitution, and even pay for their own imprisonment and correctional supervision. So, they come away from these work release programs as poor as they were when they started working. This is raw exploitation of labor. [Editors Note: This is capitalism at its finest, one step removed from chattel slavery. Worse is that it cannot function without the prisoners' consent and cooperation.]

Without support from our unionized brothers and sisters in the free world, prison labor will be exploited and abused to its fullest, and there will be many more tragedies. For now, prison laborers are unprotected, and employers are lining up to take advantage of this cheap labor. We need to be represented by a progressive labor union. We need outside support. Contact: Dan Cahill # 251641, P.O. Box 56, Lebanon, OH. 45036. ■

FL Enacts More Anti-Prisoner Laws

On June 14, 1995, several laws affecting prisoners were passed into law without the signature of Governor Lawton Chiles. Under this legislation prisoners convicted after October 1, 1995, must serve at least 85% of their sentences in prison. Other laws will expand the prison system's "legal" population capacity and impose mandatory minimum terms for repeat offenders convicted of a fourth violent crime. The measures are expected to cost more than \$2 billion and double the prison system's current 60,000 prisoners within the next five years.

These laws had initially been proposed as an amendment to the Florida constitution but failed to make the ballot last year after the state Supreme Court threw it out as being misleading to voters. The ballot initiative was sponsored by a group called Stop Turning Out Prisoners, lead by Kathleen Finnegan, a former prosecutor. [Editor's Note: the name of STOP is quite ironic in that "turning out" in prison slang generally refers to the act of sexually assaulting and effeminizing a prisoner. So in that spirit, we too think the state should stop "turning out" prisoners.] Despite the electoral setback the STOP plan soon gained momentum among state legislators who passed it into law.

The effect of changing the prison system's "legal" capacity is a classic legislative sleight of hand. As a result of prior litigation Florida prison officials had to maintain the prison system close to its rated capacity, usually around 98% or so. When the prison population reached or exceeded that point measures were taken to reduce the population, such as earned early releases, gain time, etc. By changing that "legal" capacity without building any additional prison cells the legislature thinks that by waving its magic wand it can thus "create" 40,000 cells out of say 30,000. Other states such as California are attempting to do the same thing. It remains to be seen how this will fare in court.

Governor Lawton Chiles claims he was opposed to the bill but did not veto it. A typical case of liberal opportunism: claiming to be opposed to something, being in a position to do something about it and then doing nothing. The net ef-

fect for prisoners remains the same: Republicans will beat us to death with a baseball bat and Democrats will use a stick. STOP isn't taking any chances, though, and has collected 100,000 signatures to get the measures put on the ballot and incorporated into the state's constitution in next year's election. ■

Gunslingers Dressed in Hot Pink

Alabama has been in the forefront of new, not necessarily good, ideas lately. The state that brought back chain gangs has announced, in May, 1995, that it will begin dressing male prisoners who habitually expose themselves to female guards in hot pink pants and shirts. The DOC has ordered 50 of the outfits, hoping to shame the prisoners into not exposing themselves. The outfits are being made by prisoners working in a DOC garment shop. The first set of outfits was returned to be recolored because one prison official said they were not "pink enough." Charlie Bodiford, spokesman at the Holman prison, said nothing else has worked. "We've even taken disposable cameras and taken a picture of them and told them we were going to send it to their mothers. They don't care," he said.

Alabama deputy DOC commissioner J.D. White told the media that "The heckling from the other inmates is the thing they are not going to like." Referring to the exhibitionists as "gunslingers," no details were disclosed as to what criteria would be used before the prisoners were dressed in these outfits. Bodiford characterized some 20 to 30 Holman prisoners as "habitual gunslingers."

Apparently it hasn't occurred to Alabama prisonrats that perhaps the "gunslingers" could use some therapy or counseling. Stan Brodsky, a former prison psychologist now teaching psychology at the University of Alabama, stated that if their goal is to irritate female guards, the outfits might just encourage the "gunslingers." "If the women officers don't react, I suspect it's a behavior that will diminish on its own," he said. We're sure that hot pink outfits will get to the root of the problem. ■

MN Passes Laws against Prison Litigators

The 1995 session of the Minnesota state legislature passed laws aimed directly at jailhouse lawyers. MN Statute § 243.241 titled "Civil Action Money Damages" was created. It states: "Money damages recovered in a civil action by an inmate confined in a state correctional facility or released from a state correctional facility under section 244.065 or 244.07 shall be deposited in the inmate's inmate account and disbursed according to the priorities in section 243.23, subdivision 3."

Minnesota readers should note that any attempts by the DOC to seize damage awards from federal civil rights actions are unconstitutional. A similar Missouri law was struck down by the eighth circuit three years ago. In *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992) the circuit court struck down Missouri's "Incarceration Reimbursement Act" which required that 90% of a prisoner's assets be seized to pay for the costs of his incarceration. At 861: "We thus conclude that Section 1983 preempts the Missouri Incarceration Reimbursement Act as it is applied in this case. To the extent that the Act permits the state to recoup the very moneys it has paid to satisfy a section 1983 judgment against one of its employees, the Act is invalidated under the Supremacy Clause." There is additional case law on this issue which should be researched by Minnesota prisoners.

The other new law passed was MN Statute § 244.035, "Sanctions Related to Litigation." "The commissioner shall develop disciplinary sanctions to provide infraction penalties for an inmate who submits a frivolous or malicious claim as determined under section 563.02, subdivision 3, or who is determined by the court to have testified falsely or to have submitted false evidence to a court. Infraction penalties may include a loss of privileges, punitive segregation, loss of good time, or adding disciplinary confinement time."

The constitutionality of this law will likely depend on how it is applied. Other states, such as Texas and Arizona, have passed similar statutes recently (See *PLN*, February, 1995) but to our knowledge none have yet been challenged in court. The Minnesota legislature passed the above laws unanimously. ■

AZ Court Affirms Food Packages

In an Order dated April 7, 1995, United States District Judge C.A. Muecke ruled in *Hook v. Arizona*, No. CIV 73-97 PHX CAM, that Arizona inmates will continue to receive three 25 pound food packages at Christmas. Arizona inmates will also be allowed once again to have hot pots in which to prepare such foods. Inmate hot pots had been banned in a memo by ADOC Director Sam Lewis on January 31, 1994, although those inmates who already had hot pots were allowed to keep them. Regarding the hot pots, Judge Muecke ruled, "No orders, memorandums, instructions or regulations, or any directive to that effect, shall be issued by the ADOC in conflict with the prisoner's obtaining hot pots. This includes the Director's memorandum of January 31, 1994."

Arizona Department of Corrections Director Sam Lewis has complained in the media that inmates do not have a constitutional right to receive Christmas food packages. Answering this complaint in his Order, Judge Muecke stated, "ADOC entirely misses the point. As the Ninth Circuit pointed out, the ADOC consented to the Christmas package provision in the Consent Decree, so the 'fault lies with the Department for including the provision as part of the Consent Decree.'" *Hook v. Arizona*, 972 F.2d 1012, 1017 (1992). The issue is not whether the inmates have a constitutional right to Christmas packages but rather whether such a provision was included in the Consent Decree."

In the conclusion of his Order, Judge Muecke stated, "This Court has not forced the terms of this Consent Decree upon the parties. Instead, the parties placed the burden on themselves in settling this lawsuit with a Consent Decree. The parties' attorneys wrote every word of this Consent Decree many years ago. Both parties agreed to everything they wrote in the Consent Decree. This Court merely signed the agreement between the parties."

It is well known that Judge Muecke and Director Lewis have not enjoyed an amicable relationship. Governor Fife Symington got into the act by calling for

a 12-year limit on all federal judges instead of their current lifetime appointment. This shouldn't come as much of a surprise in a state where legislators passed a law to ignore federal court orders regarding compensation of special masters appointed by the federal courts. The Arizona House of Representatives passed a measure last session calling for Arizona's secession from the Union, although it failed in the state Senate.

In an article in the May 12, 1995, issue of *Arizona Capitol Times*, Senate Minority Leader Peter Goudinoff said, "The crackpots are not all hidden away in small, Midwest towns or in the desert around Kingman — they're sitting down at the state Legislature making public policy. It's dangerous when elected representatives refuse to accept the fundamental legitimacy of government. It sounds like anarchism, except that real anarchists don't believe in private property."

Speaking of Director Lewis in the conclusion of his Order, Judge Muecke stated, "This Court is quite concerned about the ADOC and Director Lewis' pattern of conduct in this lawsuit. (Instead of practical input to work out problems in the implementation of the Consent Decree, or suggesting language to reflect problems, or addressing matters in pleadings filed with the court, Director Lewis consistently speaks out to the media, provokes press reaction, and attempts to circumvent the law.) Director Lewis is supposed to be in charge of law breakers (inmates) but objects when this Court requires him to follow the law. Based on the record in this lawsuit, Director Lewis appears to believe that it is unfair for the Court to require him to follow court orders, to abide by the terms of the contract (the Consent Decree) his attorneys' wrote, or present sufficient evidence to support his motions filed with the court."

"At every conceivable opportunity, Director Lewis raises political issues that have nothing to do with this case. It is almost certain that upon issuance of this order Director Lewis will immediately protest that this Court wishes to run the state prisons and impose expensive ob-

ligations upon the state and the ADOC. Director Lewis may state that defendants followed the Court's requirement to file a motion to modify, but it was futile to do so because this Court denied the motion."

"Unfortunately for the ADOC and Director Lewis, based on an old and fundamental concept of law in the United States, the United States Supreme Court has required a party to present *Sufficient Admissible Evidence* of factual and legal changes in order for a court to grant a motion to modify. For whatever reasons, the ADOC, Director Lewis, and his attorneys, have failed to present the sufficient evidence to meet their burden required under the law."

As an example of the kind of evidence ADOC presented to the court, consider the following: "Defendants merely provide documented evidence of six incidents of contraband coming into the prison in 97,000 Christmas packages over four years."

Not to be outdone by Judge Muecke, Director Sam Lewis issued Management Order #29 on April 27, 1995, twenty days after Judge Muecke's Order, eliminating inmate banquets at all ADOC institutions, regardless of custody level. Banquets were traditionally held in ADOC to celebrate such occasions as Cinco De Mayo, Juneteenth, Fourth of July, and Native American Powwow. Coming as it does on the heels of Judge Muecke's Order, it is apparent that this action is retaliatory in nature. ■

Madrid Published

In the August, 1995, issue of *PLN* we reported *Madrid v. Gomez*, the class action suit challenging conditions at Pelican Bay State Prison in California. We noted that as we went to press the ruling had not been published despite having been issued on January 10, 1995. The ruling was published at: *Madrid v. Gomez*, 889 F. Supp. 1146 (ND CA 1995). ■

AZ's War on the Federal Judiciary

In large class action suits when courts find constitutional violations they sometimes order large-scale changes. This is especially the case in institutional reform litigation that typically involves prisons. To ensure that court orders are being carried out and to measure progress, which sometimes takes years and often encounters resistance and hostility from prisoncrats, the courts appoint special masters to oversee the changes and offer independent progress reports and findings of fact to the court. 42 U.S.C. § 1988 is a federal statute which authorizes federal courts to shift the costs of attorney fees and litigation expenses to the losing party, i.e. the government. The fees for special masters are typically paid by the defendants under § 1988.

The Arizona DOC has been embroiled in several major class action suits challenging various aspects of the prison system, including court access, medical care and more. Likewise, current Arizona prison director Sam Lewis has also been challenging past consent decrees on various issues previously litigated and won by prisoners. To monitor DOC compliance with previous court orders federal courts have appointed several special masters. The special masters are typically people with experience in prisons.

This is the background for Arizona governor Fife Symington and the legislature's declaration of war on the federal judiciary. In his January, 1995, state of the State address Symington proposed legislation that would "outlaw" the payment of Arizona state funds to federally court appointed special masters in prison cases. Three months later the legislature passed the legislation.

Alice Bendheim, a Phoenix lawyer with the ACLU who represents prisoners in one of the class action suits said that she or the special master may seek a contempt ruling against the state if payments to the special masters are cut off. Kurt Davis, a Symington aide, joked, "who do they arrest? If they want to do it right, they have to serve subpoenas on the entire legislature."

Davis is a Symington appointee to the "Constitutional Defense Council

(CDC)," a rather cynically named organization considering that its main purpose is to explore and implement strategies by which Symington and his ilk can defy the US constitution. Symington and his Corrections Director Sam Lewis, want free reign to turn Arizona prisons into fascist concentration camps beyond the reach of federal court (and constitutional) scrutiny. The three member CDC was given \$1 million by the AZ state legislature to wage a legal battle against the federal government and the US constitution. The panel selected air and water quality regulations and federal court intervention in the prison system as its first areas of focus, Davis said.

Symington, when railing against the federal judiciary and federal regulations, characterizes the issue as one of "state's rights." This is the same catch phrase often invoked by George Wallace and the other Southern segregationists who opposed efforts by the federal judiciary to end Jim Crow laws.

Symington has focused much of his ire on US district court judge Carl Muecke. At one point Symington issued an angry call for Muecke's impeachment. But because federal judges can only be impeached for high crimes and misdemeanors, the governor was forced to back down after a few days.

Under the supremacy clause of the US constitution Symington is going to lose this battle. Namely, until Congress repeals or modifies § 1988 the state has to pay the fees it is assessed in implementing court orders. Even the legislature realizes this, its sponsor Ernie Baird said "We want to find out if any court in the land will agree with us and will say that this judge has gone too far." Of course, if saving money were even an issue here the state wouldn't be violating prisoners' rights and when found in violation of prisoners' rights would simply comply with the court order rather than try to put itself beyond constitutional scrutiny. The special masters are paid about \$144,000 a year to monitor prison conditions in three class action suits.

On August 25, 1995, attorneys representing the prisoners in two separate class action suits, one dating from 1973

and the other from 1984, filed motions asking that DOC Director Sam Lewis be held in contempt for refusing to pay the special masters in these cases. The law signed by Symington went into effect on July 13, 1995, but its impact wasn't felt until August 15 when the masters were due to be paid. The contempt motion asks that Lewis be fined \$1,000 a day for each day the masters are not paid.

The Constitutional Defense Council has appeared in court on Lewis's behalf and is arguing that the federal court cannot compel payment of the fees because they are banned by state law. They argued that the eleventh amendment bars the expenditure of state funds by federal courts. Needless to say, there is little merit to this argument because Congress can override a state's Eleventh amendment immunity from suit, and § 1988 did just that. Andrew Gordon, one of the prisoners' attorney said, "They can shuck and jive all they want, but the court is going to order the state to pay all the fees. They're just making this stuff up as they go along." The contempt motions will be ruled upon by judge David Ezra, a visiting federal judge from Hawaii. ■

Reader Mail

PA Settlement Correction

Regarding your article in the July issue of *Prison Legal News* on page 11 about the Pennsylvania Department of Corrections, you state "attorneys representing all PA state prisoners had reached a settlement...." Two Pennsylvania prisons were not part of that litigation. SCI Pittsburgh was involved in ongoing litigation, *Tillery v. Owens*, 799 F.Supp. 1256 (W.D. Pa. 1989), aff'd 907 F.2d 418 (3d Cir. 1990), cert. denied, *Mikesell v. Morgan* 112 S.Ct. 343 (1991). SCI Muncy (women's prison is covered by the consent decree in *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986) aff'd without op., *Beehler v. Lehman*, 989 F.2d 486 (3rd Cir 1993).

Scott Rudnick
Lewisburg Prison Project

News in Brief

Vietnam: During the American attack on Vietnam the South Vietnamese government took over a prison originally built by the French on Con Son island and turned it into a notorious torture and murder camp. Communists and other opponents of the puppet regimes were held for years in notorious "tiger cages" on the island. PMC Jinwon, a South Korean company, recently announced plans to build a \$298 million tourist resort on the island. The resort will have several hotels, golf courses, shopping centers and be able to accept cruise ships. No mention is made of whether the prison will be part of the island "tours."

NJ: On June 22, 1995, governor Christine Whitman signed a "3 strikes" law into effect. The NJ version of the law mandates imprisonment for 35 years for any felon convicted of a first degree felony for the third time. Prisoners will be held until they are at least 70 years old and can convince the entire state parole board they no longer pose a threat to society. The bill also extends the sentences imposed on numerous categories of those convicted for the third time of committing less serious crimes.

PA: On August 14, 1995, several dozen prisoners at the Coal Township prison in Shamokin rioted during lunch. Fifteen guards were injured trying to break it up. The prison was placed on a lockdown. The cause of the uprising was not reported.

CA: On August 7, 1995, a jury awarded \$15.9 million to 36 people who were beaten or arrested by Los Angeles sheriff's deputies during a bridal shower. The trial lasted six months and 110 witnesses testified. The deputies claimed they were responding to reports of street fighting and were attacked by the party goers. None of the people arrested were convicted and most charges were dropped. Individual damage awards ranged from \$30,000 to \$3.9 million.

FL: On August 4, 1995, less than two months after the Wackenhut Corporation opened its private prison in Glades County the corporation fired its jobs trainer, Lt. William Myers, after learning he had been fired from the Charlotte

Correctional Institution in Punta Gorda, FL in March for having sex with a prisoner. According to FL DOC officials Myers confessed to having sex with a prisoner named Jeremiah Knight, writing him letters afterwards and offering to pay him for sex as well. Knight reported the incident because he claimed he was afraid of Myers. Myers had previously been fired from the New Jersey DOC in 1993 after he was found violating rules by visiting a prisoner and giving him money.

Italy: A 1993 law prohibits people with AIDS from being imprisoned. One result of this has been a gang of AIDS infected robbers which has committed a series of bank robberies, been arrested then released due to their HIV status, when they pulled off more robberies. The bandits claim they need to steal in order to survive. Prosecutors are calling for the law's repeal.

South Africa: Correctional Services Minister Siphosiso Mzimela has adamantly refused to allow condoms to be distributed in the nation's prisons until he receives "irrefutable evidence" of homosexual activity in prisons. He admits that homosexual activity occurs in prison but said that until the prisoners engaged in it come forward he will not allow condom distribution. Mzimela is also criticized for his AIDS policies which segregates HIV+ prisoners, feeds them specially marked food and provides them with little treatment or counseling.

CO: Twenty six Colorado prisoners who have been sent to Texas prisons have filed suit claiming they are being kept in a dirty, crowded converted warehouse with no privacy. They also complain of a lack of law library access, recreation facilities and other basic amenities.

IA: Thomas Farmer, 43, was the first defendant convicted under the federal "3 strikes" law. Farmer was convicted of robbing a Waterloo, IA food store in October, 1994, a month after the law was signed. This was his fourth conviction. Farmer was sentenced to life in prison plus five years. Sixteen other federal three strike cases were pending around the country as of August 15, 1995.

PA: On July 14, 1995, at least 30 guards and prisoners were injured at the Philadelphia Detention Center. More than 300 prisoners seized and held a cell block for two hours. Heat, humidity and a lack of air conditioning were cited as the reasons for the rebellion.

WA: On August 28, 1995, former King County (Seattle) jail guard Victor Calender, pleaded guilty to one count of police misconduct for having sex with two female prisoners at the jail. One prisoner testified that she consented to sex with Calender, the other testified that he forced her against a wall and fondled her. Jail workers told police that Calender frequently isolated women prisoners in a secluded jail room. ■

Chomsky Tape Available

Noam Chomsky is America's foremost dissident intellectual. He gives excellent, piercing analysis of American foreign and domestic policy and whose interests it serves. We have frequently recommended his books. Now, for a limited time PLN has a one hour radio version, on tape, of the movie *Manufacturing Consent: Noam Chomsky and the Media*. Puzzled about media coverage on crime and its bias? Chomsky spells it out in the foreign policy context.

.....These are factory tapes made out of transparent plastic, they are not factory sealed. These were donated to PLN for use as a fund-raiser. To order tapes please send \$10, per tape including shipping, to PLN and specify that you want the tape. This is a great buy with the money going to a worthy cause.

Legal News

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WA Civil Commitment Law Ruled Unconstitutional

In a tersely worded decision, Federal District Court Judge John C. Coughenour drove a stake into the heart of Washington's controversial civil commitment law (Wash. Rev. Code § 71.09). He ruled the statute unconstitutional on its face, citing: "the violation of the substantive due process component of the Fourteenth Amendment; the violation of the Ex Post Facto Clause of Article 1, Section 10 of the [U.S.] Constitution; and the violation of the Double Jeopardy Clause of the Fifth Amendment."

The August 25th ruling was in the form of an Order on Cross-Motions for

Summary Judgement in the habeas corpus petition of Andre Young. Coughenour granted the habeas writ. "The judge said it about as unequivocally as you can that it's a bad law," said federal public defender Peter Avenia, who represented Young in the habeas action.

As part of the ruling, Coughenour ordered counsel to submit briefs on the issue of releasing Young pending appeal. On September 11, 1995, Coughenour equivocated. He denied Young's motion for release, stating that "the balance of relevant interest tips in favor" of keeping Young (and the 30 other men presently detained under the statute) confined. "While the court agrees with Young that issues of dangerousness and flight are irrelevant when a criminal reaches the end of his criminal sentence, these issues are not irrelevant" when there is a possibility the 9th Circuit will uphold the state law, Coughenour wrote.

The WA civil commitment law was passed in the wake of several acts of sexual violence, highly sensationalized by a media that had discovered the profit value of highlighting crime to drive up its circulation and ratings. However, a waste-product of this type of tabloid journalism is a frenzy of public outrage, which in this case culminated in the "Tennis Shoe Brigade." Hundreds of outraged citizens marched to the WA state Capitol in Olympia and dumped childrens' tennis shoes on the Capitol steps. The shoes were meant to symbolize the victimization of innocent children by depraved sexual predators. Obscured by this outrage

against "stranger-predators" is the fact that 85% of child sex-abuse victims are assaulted by family members or family acquaintances.

The "Brigade" was spearheaded by two mothers whose children were brutalized by recently released prisoners, both of whom had previously been convicted of sex offenses. One of the outraged mothers, Ida Ballasiotes, surfed the tidal wave of public outrage all the way through a successful bid for election to the state legislature. She currently chairs the House Corrections Committee. [See: WA "Corrections" Committee; *PLN*, Vol.6 No.3]

Ballasiotes and another political opportunist, King County prosecutor Norm Maleng (who is currently making his third run for the office of Governor) were members of the task force that wrote the Community Protection Act of 1990. Provisions of the Act increase sentences for sex offenders, require community registration of sex offenders, and allows for public notification of the impending release of "dangerous" sex offenders, among other things.

The Act also includes the Sexually Violent Predator statute (hereafter referred to as "Statute") which was the focus of Coughenour's ruling. The Statute authorizes the indefinite "civil commitment" of defendants determined to be "sexually violent predators," defined by the Statute as a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality dis-

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Civil Commitment (Cont.)

order which makes a person likely to engage in predatory acts of sexual violence."

The Statute does not attempt to define the term "personality disorder." However, "mental abnormality" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person as a menace to the health and safety of others." In order to focus applicability of the Statute exclusively on the media-monster-myth "stranger-predator," (as opposed to those who sexually prey on their own children) the Statute defines "predatory acts" as "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization."

The Statute allows the state to initiate the involuntary commitment process when a prisoner's sentence for a sexually violent offense is about to expire, or when a person who was incompetent to stand trial, or was found not guilty by reason of insanity of a charge of a sexually violent offense is about to be released.

To initiate the commitment proceedings the county prosecutor or attorney general files a petition alleging that the person is a "sexually violent predator." Upon finding by a judge of probable cause, the person is taken into custody and transferred to the Special Commitment Center (SCC) for evaluation "by a person deemed to be professionally qualified to conduct such an examination...."

A person charged under the Statute is entitled to a trial within 45 days after filing of the petition. The court or jury "shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator..." If such a finding is made, the defendant is involuntarily civilly committed. The Statute forbids detaining the committed "sexual predators" in state mental facilities or regional rehabilitation centers, "because these institutions are insufficiently secure for this population." Rather, the Statute allows confinement only in facilities located within "correctional institutions."

Although committed to the SCC for "treatment," the Statute sets forth no particular requirements for treatment of the detainee, except that care and treatment must conform to "constitutional requirements." Previous court rulings have found the "treatment" at the center to fall short of this standard. [See: "WA Special Commitment Center Failing" *PLN*, Vol.6 No.3]

To obtain release from the center, the detainee must petition the court. If it appears to the Secretary of the Department of Social and Health Services (DSHS operates the commitment center) that "the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released," then the Secretary authorizes the detainee to file a petition for release.

Once per year the Secretary of DSHS is required to provide the detainee written notice of their right to petition without the Secretary's approval. Such

notice must be accompanied by a waiver of rights. If the detainee does not waive the right to petition, the court must hold a show cause hearing "to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large." Although the detainee has a right to counsel at the hearing, he has no right to be present.

Other than these annual reviews, the detainee has no right to a petition for release "unless the petition contains facts upon which a court could find that the condition of the petitioner has so changed that a hearing was warranted." Absent such a showing, the court is required to summarily deny the petition.

Substantive Due Process

The substantive component of the Due Process Clause of the Fourteenth Amendment "bars certain arbitrary, wrongful government actions regardless

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of the fairness of the procedures used to implement them." *Foucha v. Louisiana*, 504 U.S. 71, S.Ct. 1780, 1785 (1992). [Reported in *PLN*, Vol.3 No.7]. Primary among the liberty interests protected from arbitrary government actions is freedom from bodily restraint. The court outlines those circumstances under which the law allows bodily restraint for non-punitive reasons. Among those few narrowly defined circumstances is the authority of the state to "protect the community from the dangerous tendencies of some individuals who are mentally ill." Citing *Foucha* again, the court lays out the core test to be met by the WA civil commitment statute: "Absent clear and convincing evidence of *both* mental illness *and* dangerousness, however, detention is impermissible." [emphasis added]

The Statute fails to meet this standard. "The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill." The court finds evidence of this in the statutory language and legislative history of the Statute. The very language of the Statute identifies the target group as individuals "who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act." Once the legislature decided to abandon the "traditional" definition of mental illness, they attempted to craft a new definition that would serve their purposes, by defining "sexual predators" as one who "suffers from a mental abnormality or personality disorder."

The court takes note of the amicus brief submitted by the Washington State Psychiatric Association that "explains that the term 'mental abnormality' has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals." The term "personality disorder" is found equally unenlightening by the court. The court concludes that the Statute is not designed to provide for the commitment of dangerous mentally ill or mentally disordered persons. The Statute specifically targets individuals with "antisocial personality features." The court finds that "the mere presence of antisocial personality, or other personality disorder falling short of mental illness, is constitutionally insufficient to support

indefinite confinement." The court concludes that this type of indefinite confinement clearly violates the substantive protections of the Due Process Clause.

Ex Post Facto

The court gives a fairly detailed overview of how courts have previously interpreted the scope of the ex post facto prohibition. It then focuses on the factors relevant to the case at bar. "The debate here is not whether the Sexually Violent Predator Statute is retrospective or disadvantageous in its application to Young. Rather, the debate concerns whether the Statute is penal or criminal in nature." Courts have previously ruled that laws, even those purporting to be "civil," must be scrutinized in order to determine if the effect of the law violates ex post facto prohibitions.

Citing the supreme court in *Kennedy v. Mendoza-Martinez*, the court lists some of the factors that must be considered: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment... whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime,..."

The court then quickly concludes that the Statute "cannot be classified as civil, considering the relevant factors." Since the Statute subjects prisoners who have already served their full prison sentences to an additional period of indefinite detention, with complete loss of freedom, there "is no dispute that [the] Statute subjects individuals to an affirmative restraint."

"Second, the Statute applies to behavior that is already criminal. Indeed, it is expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity."

"Third, the Statute, in its operation, will promote the traditional aims of punishment -- retribution and deterrence." The court goes on to provide further analysis of the Statute to show that, in large part, its purpose is indeed "punishment," pointing out an element of the

Statute that was highly criticized by those who opposed the law: "it requires, on its face, that the detainee serve his entire criminal sentence before being committed or treated.... Of Course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term.... The failure of the Statute to provide for examination or treatment prior to completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern." The court concludes that, considering all of the factors, there is no dispute that the Statute is criminal, rather than civil, in its application.

Double Jeopardy

The court, having found in its analysis of the ex post facto clause that the Statute "serves the traditional aims of punishment," applies the same analysis to the question of Double Jeopardy. The court concludes that having found the law to be a criminal statute merely disguised as civil law effectively "renders the Statute an unconstitutional second punishment."

In the December 1993 issue of *PLN* we predicted that this law would be upheld by the state supreme court and overturned in the federal courts. Both predictions have turned out to be correct. Such prognostications are usually fraught with uncertainty, but the sexual predator law provides a clear example of one of the most glaring flaws in the U.S. justice system. State supreme court judges (in Washington, as in most states) are *elected* to the bench. Federal judges are appointed for life -- or until they resign the bench. The reason the sexual predator statute was upheld in the state supreme court by a 6-3 vote is because only three judges had the courage to base their vote on the law rather than on their fear of voter backlash.

The state supreme court's 1993 opinion is worth reading and comparing to the opinion from the federal bench. The majority in the supreme court give a good example of how far judges can twist law to support a predetermined outcome. The fact that public opinion ran so strongly in support of the Statute made it easy to predict the supreme court would

Civil Commitment (cont.)

uphold the Statute... no matter how far they had to bend the law in order to reach that outcome.

Washington's sexual predator law was the first of its kind, and as such was widely publicized. Since there was so much controversy surrounding the constitutionality of the Statute, other states took a wait and see attitude before implementing similar laws. When the Washington supreme court upheld the Statute, several other states (erroneously) took it as a sign that the Statute passes constitutional muster. Kansas, Wisconsin and New Jersey immediately passed "copy cat" versions of Washington's sexual predator statute. Several other states have passed or are contemplating similar civil statutes.

Immediately after Coughenour's decision came out, Washington anti-prisoner officials rushed to assure the voting public that the decision would be appealed. Norm Maleng and Ida Ballasiotes, co-architects of the Statute, announced at a press conference days after Coughenour's ruling that they were drafting a new "Two-Strikes" law for sex offenders. The law would also raise the sentence for first-time rapists from the current 6-9 years to 20-25 years.

Attorney Russell Leonard, who has handled several civil commitment cases, said he finds it revealing that the first reaction by Maleng and Ballasiotes was to call for sweeping and harsh punishment.

"Our feeling all along was the state task force that proposed the law wanted to do nothing more than incarcerate and punish this group of people from the very start," Leonard said.

Coughenour's decision is a victory for all U.S. prisoners, not just sex offenders, and not only in those states that have already passed similar law. If the sexual predator statute, which allows "preventative detention" for those who are deemed "dangerous" and "likely to offend," were to be upheld in regards to sex offenders, it would only be a matter of time before similar laws would be applied to other "violent offenders." Even though the first step down this path of the law severs the constitutional rights of "sexual predators," how far would the

law have to travel down this same path before police officers in their black and whites could target individuals on the street who fit a profile of "dangerous" individuals with "anti-social personality abnormalities" and lock them up for life... after a fair trial of course?

When this decision is published, we will let our readers know what the cite is. For now, see: *Young v. Weston*, Case No. C94-480C, (WD WA, 1995). ■

IN Passes Excrement Law

Senate Enrolled Act #56, which went into effect on July 1, 1995, added a new section to the Indiana Criminal Code which makes it a crime to "knowingly or intentionally in a rude, insolent, or angry manner place blood or another body fluid or waste on a Law Enforcement Officer or a Correctional Officer identified as such and while engaged in the performance of official duties." It also makes it a crime to coerce another person to commit such an act. This act is considered to be "battery by body waste."

The seriousness of the offense ranges from a Class D to Class A felony depending upon whether the person committing the act has a communicable disease and whether the disease was transmitted to the other person.

Indiana prisoners have been notified by DOC memo that "any offender who throws bodily fluids or waste on staff shall be considered to have committed this act." The memo also states that "this action may be referred to the local Prosecutor to file criminal charges."

It will be interesting to note if or how this law may be abused by law enforcement officials (and prison guards) who may use it as a tool to further repress "trouble makers." When a guard/cop knocks a prisoner/citizen to the ground, cracks his/her head open with a metal baton; would the bleeding victim be knowingly or intentionally in a rude, insolent, or angry manner placing blood on the guard/cop by shaking their head in a struggle to avoid more blows? There are plenty of guard/cop types who would classify such behavior as "rude and insolent." ■

From the Editor

by Dan Pens

Thanksgiving can be a tough holiday to celebrate inside a prison cage. This will be my fifteenth. The first few were mostly about self-pity. As I became more politically conscious, however, Thanksgiving took on a different meaning. It traditionally commemorates starving European conquerors giving thanks for the hospitality and life-saving bounty that Native Peoples freely shared.

By one estimate there were five to ten million Native People living in what is now the United States. They were socially, spiritually, morally and ethically superior to Europeans. The whites had two advantages, their guns, and their utter ruthlessness. Of the two, the Natives were most bewildered by the second. As Chief Black Hawk lamented upon his defeat and capture by white soldiers, "An Indian who is as bad as the white men could not live in our nation; he would be put to death and eaten up by the wolves.... The white men do not scalp the head; but they do worse - they poison the heart."

Thanksgiving is a time to appreciate the bounty of Autumn harvest. After white Europeans gained a foothold on this continent, Autumn became a time to hunt down Native Peoples and return their early hospitality by destroying villages. It was a time to pay back Native generosity by burning their corn fields and plundering their stores of dried food. Starvation and disease were left to carry out the white's ruthless policy of genocide.

For these reasons I find it impossible to celebrate a "traditional" Thanksgiving. Instead, I often find it a time of sorrow and reflection, though I try to appreciate what good I can find in myself and in the world. This year I commemorate the passing of William Kunstler and give thanks for his lifetime of activism.

Bill Kunstler was an attorney who championed the struggle for justice, often representing those whom the system had already condemned before the trial had begun -- and he usually won. At the trial of the Chicago Eight he pioneered the defense tactic of putting the govern-

ment on trial. When Bobby Seale was hauled out of the courtroom and brought back in bound and gagged, Kunstler says he learned an important lesson: "Bobby's treatment opened my eyes to misuse of power by federal judges. From that moment on, I knew that the judge and the prosecution were my enemies and that the trial was a fake." Bill Kunstler, a long-time *PLN* supporter and subscriber, will be sorely missed.

Dare I suggest that Thanksgiving is a time for *PLN* readers to give thanks for the news and legal analysis we deliver each month? As I write this the *PLN* coffers are dangerously low. We like to keep at least three months operating expenses as a reserve. These past two months we have had to pay bills from income we got that month! It's insane to operate on the edge that way. We have cut down our expenses to the bare bones. The price of printing and postage have

risen to the point where it is hard for us to stay on top of our expenses. If you have something extra you can send our way, this is the time to do it.

We are entirely "reader supported," which means that we serve no masters other than you, our readers. This empowers you to have a voice in what we print. But since "Freedom of the Press" belongs to those who own the press... If you want to own a share of the unique coverage we provide, please make a generous contribution to *PLN*.

We can not continue to operate without knowing from month to month if we'll be able to meet the next month's expenses. If we don't increase our income, you may see us go to publishing bi-monthly sometime next year. So please, make an extra contribution this year to help *PLN* continue publishing every month.

Finally, I often plug other small press publications in my editorials. I do this to let you know about other zines I personally enjoy and recommend. This month I'm suggesting that you check out a copy of *Dollars and Sense*, One Summer Street, Somerville, MA 02143. They offer free subscriptions for prisoners. I highly recommend this zine. As I have discovered: there can be no criminal justice without social justice, and there can be no social justice without economic justice. If you want to learn more about "economic justice," there is simply no other zine on the market that gives you the insight and information that you'll find in each issue of D&S!

That's all for this month. Enjoy this issue of *PLN* and pass it along to a friend when you're done. For those of you who are able to support us financially, I thank you for your generosity. ■

Double Jeopardy in Prison Not Clear

In the Oct. '95 issue of *PLN* we reported *Massachusetts v. Forte*, an unpublished state court ruling dismissing a criminal indictment because the prisoner had previously been subjected to disciplinary action by prison officials. As a result, the trial court dismissed the criminal charges arising from the same conduct, holding they violated the double jeopardy provisions of the state and federal constitutions. *Forte* noted that courts have generally held that double jeopardy does not apply to administrative and criminal sanctions imposed against prisoners but it held that *United States v. Halper*, 490 US 435, 109 S.Ct. 1892 (1989) required a change in this approach because it applied the double jeopardy clause to administrative sanctions as well.

The second circuit has rejected application of *Halper* to prison claims. This area of the law is unsettled at the moment especially as the courts grapple with the double jeopardy clause as applied to civil forfeitures. This case comes to us as an appeal from a criminal conviction. Alberto Hernandez-Fundora was being held in a federal prison on an Immigration and Naturalization Service (INS) detainer when he hit another prisoner with a table leg. Prison officials

infracted Hernandez, found him guilty and subjected him to 45 days confinement in segregation. Several months later, after he had completed the segregation term, he was indicted by a grand jury for the same act. He was found guilty.

On appeal Hernandez argued that the indictment violated his double jeopardy rights because he had already been punished for the same conduct. The appeals court rejected this argument. "It is by now well settled that 'punishment' imposed by prison authorities for infractions of prison regulations does not generally bar a subsequent criminal prosecution for the same conduct." The court cites cases from several other circuits agreeing with this proposition.

Addressing the *Halper* claim the court held that it is of limited application in prison cases, but does provide some guidance. "...The mere fact that a sanction imposed by prison officials has a punitive component does not mean that the sanction constitutes 'punishment' for double jeopardy purposes. In this context, we perceive no distinction between 'disciplinary segregation' pursuant to 28 C.F.R. § 541.21 and 'administrative detention' pursuant to § 541.22."

The court noted that the third circuit has also rejected *Halper's* application to prison situations. In *United States v. Newby*, 11 F.3d 1143 (3rd Cir. 1993), *PLN*, Vol. 5, No. 6, the court distinguished prison disciplinary cases as those determining whether prison rules have been broken and thus do not bar subsequent criminal proceedings for the same conduct.

"Accordingly, subsequent prosecutions will be barred only in those exceedingly rare circumstances where the disciplinary sanction imposed is grossly disproportionate to the government's interest in maintaining prison order and discipline. Applying this standard to Hernandez-Fundora, we conclude that forty-five days of disciplinary segregation was sufficiently related to the government's remedial interest that it did not constitute punishment for double jeopardy purposes." The court did not state how much punishment by prison officials is necessary to bar a later criminal prosecution. Given the fact that the area of law on double jeopardy is currently in flux, defendants should continue to raise the issue in criminal proceedings. See: *United States v. Hernandez-Fundora*, 49 F.3d 848 (2nd Cir. 1995). Amended at 58 F.3d 802 (2nd Cir. 1995). ■

WA Doctor Fit Only for Prisoners

In the July, 1995, issue of *PLN* we reported the disciplinary charges filed against Dr. James McGuire, the psychologist at the McNeil Island Corrections Center (MICC) in WA. While practicing as a psychiatrist in Alaska McGuire entered into a sexual relationship with one of his patients, Karma VanGelder, an Alaska state trooper suffering from multiple personality syndrome. The sexual relationship, which violated ethical and professional standards, lasted some 5 and a half years. As a result, McGuire lost his license to practice psychiatry in Alaska and moved to Washington where he was promptly hired by the DOC to work at MICC. The DOC acknowledged that it was aware of McGuire's record when he applied for the job but hired him anyway.

McGuire's duties at MICC include mental health unit counseling, including for prisoners with sex offenses, prescribing medication, diagnostic evaluations, referrals, and crisis intervention. In an interview with *The Stranger*, a Seattle alternative weekly, VanGelder stated that McGuire had submitted letters to Alaska officials that allowed her to keep her job despite the fact that both were suicidal at the time. VanGelder sued McGuire and settled the suit for \$1.39 million and negotiated an agreement which limited McGuire's practice of psychiatry: he has to be in therapy himself and cannot treat women or children.

Because the loss of a medical license in one state doesn't affect the license in another, McGuire was able to practice psychiatry in Washington. When *The Stranger* asked the DOC why they hired McGuire, Patricia Robinson-Martin, an assistant to DOC boss Chase Riveland, stated that the DOC was well aware of the Alaska incident but McGuire was the only applicant for the position. She noted "It is difficult to attract psychiatrists to work in prisons."

On June 2, 1995, the Medical Quality Assurance Commission held a hearing to determine whether McGuire's license should be suspended. In an ironic situation, the Department of Health was the party seeking revocation of McGuire's license and was represented by the attorney general's office; while McGuire

is working for another state agency and both parties appeared before yet another state agency to consider the matter. Nothing like keeping it in the family. On July 10, 1995, the Commission issued its report, which *PLN* has obtained.

In its findings of fact, conclusions of law and final order, the commission made interesting comments. Among them Dr. McGuire is taking 20 milligrams of Prozac a day to treat his own mental illness and has to attend sex offender therapy sessions once a week with his therapist in Portland, Oregon. He and his wife of 17 years, Janice McCrimmon, have also undergone marriage therapy. McGuire's therapist, Dr. McGovern, recommended that McGuire be allowed to treat adult males as he was a low risk of having sex with adult men.

The Commission concluded that McGuire had "clearly committed unprofessional conduct by violating RCW 18.130.180" and had lowered the public perception of all medical professionals. The commission held "The Respondent, however, should neither be allowed to provide individual psychotherapy to any male inmates nor to provide psychotherapy to patients in a private practice setting. The Respondent's limited practice of treating only the male inmates at the Corrections Center does contribute to the public welfare and does not represent a danger to the public." The commission held that revoking McGuire's license would be a "purely punitive act."

In its final order the commission indefinitely suspended McGuire's authorization to practice as a physician and surgeon but then stayed the suspension as long as McGuire complies with the commission's terms and conditions. Under the order McGuire can only treat male prisoners at MICC and can only practice psychopharmacology and diagnostic psychiatry; he is forbidden to give individual or group therapy. He is to be supervised by a Dr. Gage who will submit quarterly reports to the commission, and must continue his sex offender therapy. McGuire was fined \$1,000 and prohibited from using alcohol or mood altering drugs as long as he is in therapy. In essence, the commission held that McGuire is fit only to treat prisoners.

The Medical Quality Assurance Commission can be contacted at: Department of Health, P.O. Box 47866, Olympia, WA 98504-7866. Considering that Washington prisoners must pay \$3 each time they see Dr. McGuire this indicates the quality of care they are receiving. Prisoners with complaints about DOC health care providers can also complain to the commission. Anyone desiring a copy of the commission's report can obtain one from the commission, ask for *In Re McGuire*, OPS No. 94-10-19-442-MD. ■

Judge Gets Insight on Jail Reform

Sol Wachtler was the former chief judge of New York state's highest court until he was convicted in 1993 of terrorizing, stalking and harassing his ex-lover, socialite Joy Silverman, after she broke off their affair. At one point Wachtler threatened to kidnap Silverman's daughter. Wachtler was arrested after an extensive FBI investigation. While any ordinary mortal would have likely received a lengthy prison sentence, Wachtler got off with only a year in jail and halfway houses.

While serving as chief Judge Wachtler wrote several rulings which severely limited the right of criminal defendants in New York state to use a diminished capacity defense. He stated, from the bench, that people need to take responsibility for their actions and not hide behind excuses. So, guess what defense Wachtler presented when facing extensive criminal charges for his terroristic behavior? You got it: diminished capacity.

Wachtler, who now teaches at Pace Law School, had this to say about jail: "There is nothing more demeaning, more diminishing than being in prison. They treat you like garbage." Too bad he didn't have this insight when he was sitting on the bench. It's amazing what a little jail time does for judges' views on prison reform. ■

Lethal Gas Execution Cruel and Unusual

by Dale Gardner

Derek Humphry, President of the Hemlock Society, and Judge Marilyn Hall Patel have differing views on the virtues of inhaling lethal gas. Humphry, in his how-to-suicide-it manual *Final Exit*, recommends the use of potassium cyanide as a quick and "humane", although not entirely peaceful, way of dying with dignity, which he euphemizes as "Self-Deliverance."

Judge Patel of the U.S. District Court for the Northern District of CA has recently (April 14, 1995) disagreed. The court decided that "the pain experienced by those executed" by the lethal gas from potassium cyanide "is unconstitutionally cruel and unusual." Consequently she declared the California system for the execution of condemned murderers by lethal gas to be in violation of the U.S. Constitution's 8th and 14th Amendments.

Judge Patel was presented with a petition from prisoners at California's San Quentin state prison who had been sentenced to death. Their class action suit sought to have the lethal gas method of execution in CA declared unconstitutional. The trial lasted eight days and saw the presentation of evidence by five experts for the prisoner plaintiffs and two for the state. For the plaintiffs the only expert known to be a forensic scientist was Dr. Robert Kirschner, a former pathologist with the Cook County (IL) medical examiner's office.

The disagreement among the experts centered on the pain suffered by those executed through the inhalation of hydrocyanic gas. Needless to say, the California experience in cyanide induced executions was at best equivocal on the amount of pain suffered by those executed, since bodily movements could be interpreted as either volitional or non-volitional (reflex) actions.

As one defense expert put it, there is no "pain-o-meter" to gauge the pain inflicted by the cyanide gas. The basic dispute among the experts related to the time of onset of unconsciousness. Once unconsciousness occurred, then it could be said that the pain had ceased. But whether unconsciousness occurred

quickly or whether it was delayed up to even five minutes was a subject of much contention.

The scientific literature on death by cyanide poisoning was closely investigated. Although a number of articles were referenced and reviewed, none from any forensic journals were mentioned.

Even though neither party questioned the admissibility of the scientific evidence under *Daubert v. Merrell Dow*, judge Patel applied *Daubert* standards and admitted the evidence as scientifically valid and legally reliable. This holding was made in the face of the judge's statement that, "the method by which cyanide affects the body, and which system is affected first, is an unsettled question in the scientific community."

After weighing the expert testimony and the supporting literature, the most judge Patel would say was that the state's evidence, "does not demonstrate that the dose administered at San Quentin is so strong as to produce immediate unconsciousness and/or death."

However the observations of deaths by cyanide at San Quentin by trained medical personnel tipped the scales in favor of the prisoner plaintiffs' position. And two of these executions were in recent years, one in 1972 and the other in 1993. In both, "Certain unconsciousness was not recorded within three minutes after the gas hit [the prisoners] in the face."

Some of the reactions of the executed persons telegraphed their bouts of pain, such as the clenching of fists and the throwing back of the head.

A defense expert, Dr. Steven Baskin, a board certified toxicologist at the U.S. Army Medical Research Institute of Chemical Defense, disputed the claims of the prisoners and their experts that unconsciousness was delayed by minutes. But his opinions were said to be based on "his own theoretical assumptions" and not on "the real world data of the San Quentin execution records."

By any means, this case presents a remarkable piece of research that one can stand with in their fight against capital punishment. See: *Fierro v. Gomez*, 1994 U.S. Dist., Lexis 14304 (4/14/95). ■

CA Prisoners Riot

On July 7, 1995, more than 250 prisoners at the Sierra Conservation Center (SCC), near Jamestown, CA, engaged in a brawl and riot at the 5,900 bed minimum security prison. The fight took place in the yard and housing units between white and Latino prisoners and left many injured with head injuries, cuts and bruises. None required hospitalization. No prison staff were reported injured. California Department of Corrections (CDC) spokespeople said the prisoners mainly used their fists and no weapons were used beyond crutches and a guitar. Guards fired several shots but didn't strike any prisoners. No reason or cause was cited as to why the incident took place. After the brawl some 240 prisoners were transferred to other prisons across the state, most notably to control units at Pelican Bay and Corcoran. SCC was placed on lockdown after the brawl; how a dormitory style prison is locked down we don't know.

The CDC remains massively overcrowded, at more than 176% of its rated capacity. Violence within the CDC is on the upswing according to CDC officials. On June 3, 1995, a prisoner at Folsom State Prison was critically injured in what the corporate media called a "racial conflict" involving more than 20 prisoners. On August 11, 1995, a prisoner was stabbed to death on the A Facility exercise yard. According to *PLN* readers at Folsom this was a "personal" incident and the resulting lockdown was brief.

Given the convergence of "tough" sentencing policies that are leading to massive overcrowding, a ballooning budget deficit, an inability to expand the prison system fast enough and efforts by the CDC and its legislative lackeys to eliminate modest privileges within the prison system such as family visiting, weight lifting, etc., we expect to be reporting more stories of this type in the future. ■

Source: *Sacramento Bee*, July 11, 1995.

Billing Prisoners for Medical Care Blocks Access

by Mark Lopez and Kara Chayriques

In 1976, the Supreme Court established in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the government has an obligation to provide medical care for prisoners. This fundamental premise has been upheld in subsequent cases and establishes a prison's obligation to provide for prisoners' basic needs, which include medical care and treatment.

"When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 199-200 (1989).

A Money-Saver or an Obstruction to Medical Care?

However, a recent and disturbing trend in correctional health care threatens to undermine this fundamental constitutional principle. More and more prison officials across the country are beginning to charge prisoners for basic medical care. Payment is typically exacted by two methods: first, in several states, Nevada most notably, prisoners are charged \$4 for attending sick call. The second method is to require prisoners to purchase all over-the-counter (OTC) medications and products at market prices. Thus, sick call requests are simply returned to the prisoner with instructions to purchase an OTC product without ever being seen by medical staff. While practices may seem like beneficial cost-saving measures adopted by prison health care administrators, upon closer examination they interfere with access to health care services.

The policy of charging prisoners for medical services is widely hailed by corrections officials as a cost-cutting measure and a way to discourage those prisoners who abuse sick call. Administrators argue that by charging prisoners they instill a sense of fiscal responsibility and force prisoners to make mature

choices regarding how they spend their money. They also stress that no prisoner is denied access to medical care because of indigency. Instead, their account will go into a negative balance. When money is deposited into the account it will be applied to the charges for the medical services. No prisoner is charged for emergency care or for services initiated by a physician.

Administrators argue that the fee policy has greatly reduced the number of prisoners who come to sick call. For example, in an article in the Fall 1992 issue of *CorrectCare*, "Fees For Medical Services: A Cost-Saving Program," health care providers in Mobile County, Alabama describe a 50% decrease in the number of prisoners who sign up for sick call since the fee policy was implemented. Yet such a drastic drop suggests that the fee policy is excessive and forces prisoners to forego sick call in order to save money to spend on other essentials such as hygienic products or legal materials.

Prisoners and prisoner advocates take a different view. Whether the new payment schemes operate to discourage prisoners from attending sick call or *directly* obstruct access, the policies ignore the significance of full and unimpeded access to sick call and the importance of preventive care in correctional facilities. Because of the close quarters and crowding attendant to incarceration, effective measures must be taken to reduce the risk of infection and disease from spreading through the facility. The most basic of these measures is to operate daily sick-call clinics which prisoners are encouraged rather than discouraged to attend.

Early Evaluation Is Important

Timely access to sick call is the touchstone of a functioning prison health care system. Once the prisoner has entered the delivery system at the sick-call level and is seen by a clinically trained person who listens to the complaint and evaluates the need, an objective referral to a physician can be made or withheld. Through this method of triage, the relative few who choose to abuse sick call

regularly will not impose profound monetary costs on the system, while legitimate users will have ready access to all appropriate levels of care.

For example, certain serious diseases with significant public health implications can present apparently benign symptoms at the outset, such as persistent cough, headache, or even a rash. However, these symptoms could signal the onset of something far more serious, such as tuberculosis or HIV disease. In a prison setting it is imperative that these medical conditions be identified and treated promptly.

---- Forced To Choose?

Prison health care administrators argue that fee policies force prisoners to make a choice about how they will spend their money, but prisoners typically receive no state pay because of the unavailability of a prison job, or are not paid a standard market salary. Most earn only \$20 - \$30 a month or less. The situation in jails is even worse. For example, at the New Orleans Jail where prisoners receive no pay and most have only a small amount of money in an account, a \$3-\$5 charge for an OTC product can be a substantial setback, especially if they have other things to buy. This practice was recently enjoined by United States Magistrate Judge Alma Chazez, in litigation brought by the National Prison Project in *Hamilton v. Morial*, Civ. No. 69-2443 (Order, Mar. 4 1993 (E.D.La.)(discussed below).

A prisoner in the New Orleans Jail, as in most prisons and jails, must pay for very basic hygienic supplies such as underwear, socks, sheets, shaving cream, shampoo, skin lotion, toothpaste, toothbrushes, sanitary napkins, etc. This is also true of reading and writing materials, postage and phone calls. Except for meals, a pair of slacks, a shirt, and a blanket, prisoners are entirely dependent on their families to sustain them. Prisoners are therefore forced by payment policies to make a choice between two necessities of life in the institution: medication or hygienic/personal supplies. Many may choose to forego the OTC medication and try to obtain the other

supplies believing that they do not have money for both.

Finally, payment policies typically have no provision for indigence. Policies will note only that the prisoner's commissary account will be debited and if there is no money in the account a "negative balance" will be created. Often, prisoners will do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy the prison's charges.

Legal Issues

Proponents of the various payment schemes claim that the courts have addressed the issue and determined the plan to be constitutional. Opponents take a different view of the courts' various interpretations of these practices. A decision from the Tenth Circuit Court of Appeals in *Collins v. Romer*, 962 F.2d 1508 (10th Cir. 1992) is the most instructive case. In that case the court, dealing with an attorney fees issue, thoroughly discusses the (unreported) district court opinion which found the Colorado Department of Corrections' payment scheme unconstitutional (prior to its amendment). The original policy required a \$3 payment whenever a prisoner was seen by a physician, dentist, or optometrist. The court observed that this requirement as much too harsh considering the meager level of prisoner pay and the state's corresponding duty to provide medical care. The amended policy, which imposed payment only if the prisoner sought a second opinion, was subsequently upheld. On these facts, the court of appeals found that plaintiffs were responsible for the repeal of the original policy and were entitled to fees. Thus *Collins*, although mainly dealing with attorneys' fees, acknowledges the unconstitutionality of the Colorado medical payment policy.

The only other reported decisions addressing this subject are inconclusive on the fundamental Eighth Amendment question. In *Shapley v. Nevada Bd. of State Prison Com'rs*, 766 F.2d 404 (9th Cir. 1985), a pro se prisoner argued that the imposition of a \$3 charge for each medical visit was unconstitutional. The district court dismissed the complaint as frivolous; the court of appeals agreed,

stating that the prisoner failed to allege "facts revealing how the \$3 fee affected him." Shapley did not claim he was denied medical treatment because he was unable to pay the \$3 fee, nor that prison officials denied medical care to other prisoners who are indigent. "The complaint alleges no facts which the court could construe as deliberate indifference...." *Id* at 408. This case plainly fails to reach the issue of payment despite the claims of payment proponents. [See also another inconclusive case from Nevada, *Scott v. Angelone*, 771 F.Supp 1064 (D. Nev. 1991) *aff'd* 980 F.2d 738 (9th Cir 1992).]

A policy in Louisiana of charging prisoners for over-the-counter medications was challenged recently by the National Prison Project in *Hamilton v. Morial*. The New Orleans sheriff instituted a policy whereby prisoners would be charged for 20 over-the-counter medications such as Tylenol, vitamins, ibuprofen, Sudafed, etc. The drug would be dispensed at sick call and the prisoner told that his commissary account would be debited the cost shown on the medication. He could either accept the charge and the drug, or refuse the drug. If he did not have enough money, the drugs would still be given, creating a negative balance in his account. The district court ordered the sheriff to stop charging prisoners for OTC medications. If the sheriff was having financial trouble with maintaining the pharmacy, the court said, he should seek redress with the city, not impose costs on the prisoners.

Better Management of Medical Services Is the Answer

The real point of the payment policies is not to offset the expense associated with the delivery of health services, but to reduce the number of prisoners who attend sick call. Newly implemented department-wide policies in Indiana and Montana bear this out. A prisoner submits a request for medical attention, otherwise known as a "kite." Health officials return it, without seeing the prisoner, with instructions to purchase an OTC medication from the commissary. Through this measure, sick call attendance has been reduced dramatically; without regard to whether the

prisoner has any money in an account. In Montana, an indigent prisoner may resubmit a kite pointing out a lack of funds. "After considerable delay, the medicine will be supplied. In Indiana no such allowance is made. Prison officials there take the position that they have no constitutional duty to attend to "non-serious" medical needs. Yet such a policy ignores the fact that without proper treatment, a "minor" condition could become serious, and be prevented altogether with prompt attention. Such a gross inattention to medical needs threatens prisoners' Eighth Amendment right to medical care.

If the current sick-call process is unmanageable at a particular institution prison administrators should manage it better or provide additional resources so that the required care is maintained. The appropriate response is to provide additional clinics, not to reduce prisoner access. This view is consistent with the analysis offered by B. Jaye Anno, secretary of the National Commission for Correctional Health Care. Writing about prisoner payments in a book published by the National Institute of Corrections, U.S. Department of Justice, she says:

"...It begins with ensuring full and unimpeded access to the primary level of the prison's health care delivery system. Here the prisoner typically encounters a nurse... or other clinically trained person who listens to the complaint and evaluates the extent of need. Once the prisoner has "entered" the delivery system, all referrals to more specialized and more costly levels of care should be the decisions of professional staff based on an objective assessment. In this way the relatively few persons who choose to abuse sick call regularly will not impose significant monetary costs on the system. . ."

As to any anticipated cost savings, she adds:

"[E]stablishment of a co-payment system also may be viewed as a means of generating revenue, but fees high enough to generate appreciable revenues will inordinately reduce utilization. Moreover, the cost of collecting the co-payments is not insignificant and might well exceed any revenue generated. Therefore, the only possible economic benefit would result from decreased utilization."

Med Care Billing (cont.)

* * *

To summarize, the various arguments raised to support payment policies all fail in light of the corresponding duty of the correctional system to provide for the medical care of its prisoners. A payment policy not only discourages the few who abuse sick call from attending, it also discourages those prisoners with legitimate medical concerns. Additionally, under no circumstances should the State be permitted to pass on the costs of medical care to prisoners by enforcing a fee policy. If that were allowed there would be no end to the costs the State might seek to recover from the prisoners and their families. Once prisoners have been deprived of their livelihood, it is incumbent upon the State to provide life's basic necessities, the most basic of which is medical care. See *DeShaney, supra*, 489 U.S. at 197-200.

[Editors' Note: The previous article is reprinted from the Spring 1994 issue of the *National Prison Project Journal*. We rarely reprint their articles because we encourage people to subscribe to the *Journal*. As more and more states pass laws charging prisoners for their medical care we think it is important that this information reach as wide an audience as possible. On June 15, 1995, Washington state passed HB 2010 which will charge prisoners \$3 each time they seek medical care or treatment.

There is currently litigation pending on the legality of this type of law in the federal courts in Nevada and California challenging DOC laws. A pending lawsuit [*PLN* Feb. 1995], challenges the practice of charging detainees in the Pierce (Tacoma WA) County jail \$3 each time they seek medical care. Litigation on this may also be pending in Arizona. So it is likely that more rulings will be coming down soon.

Two rulings of interest to readers are *Benter v. Peck* 825 F. Supp. 1411 (SD IA 1993) [*PLN*, Jan. 1994] which held that it violates the eighth amendment to charge prisoners for medical care because the state is obligated to provide such care to prisoners. *Martin v. DeBruyn*, 880 F. Supp. 610 (ND IN 1995) will be discussed at greater length in a future issue of *PLN*. In that case the

court held that charging prisoners for medication was not necessarily unconstitutional but in this case the application of the policy may have violated the prisoner's eighth amendment rights. *Benter* involved a case going to trial and the prisoner winning over a \$12 pair of eyeglasses. *Martin* is a case going to trial over less than \$4 worth of ulcer medication. The latter court commented: "This is a dispute of constitutional magnitude about the payment of less than four dollars for medicine. Regardless of whether the directives at issue ultimately are found to have violated anyone's constitutional rights the defendant's approach has produced a colorful constitutional claim costing the state and federal tax payers thousands of dollars more than the cost of the medicine. One wonders at the role of common sense in all this." As the authors note in the preceding article it's not about "common sense" or "cutting costs" and certainly not about safeguarding prisoners' health. We ask that readers keep us advised of any litigation and ruling on this issue so we can report developments on this issue.] ■

AZ Guards Rob and Kill

On February 16, 1995, police arrested a retired cop and three Arizona prison guards in the robbery of an armored car and the killing of a Wells Fargo driver. On November 28, 1994, an armored car was hijacked and robbed with between \$200,000 and \$900,000 taken. The armored car's driver was found shot to death inside the vehicle.

Those arrested and charged in the robbery murder were William Ferguson, a former Phoenix policeman, James Greenham, who had worked as a prison guard at numerous Arizona DOC facilities, Timothy Ring and his wife Elvia Sotelo-Ring who both worked as guards at the Perryville prison complex west of Phoenix. FBI agents were quoted saying they had wiretap recordings where the defendants made incriminating statements implicating them in the robbery. They described the robbery as being "very professional." We wonder what Greenham and the Rings' opinions on prison reform and the death penalty are. ■

Source: *Arizona Republic*, February 17, 1995.

World's Longest Held Political Prisoner Released

On August 15, 1995, Kim Sun Myung was released from a South Korean prison after spending more than 43 years in captivity. Kim had the unhappy distinction of being the world's longest held political prisoner. Kim was captured 43 years and ten months ago in 1951 by American military forces fighting to prevent Korean unification. Kim was initially sentenced to death for espionage by the South Korean government, a charge he denies. The sentence was later commuted to life imprisonment. A steadfast communist, Kim could have been released decades earlier had he renounced his political beliefs and denounced North Korea and communism. The South Korean government kept Kim in solitary confinement for decades, with no news, losing his vocabulary from having nothing to read and no one to talk to and going blind from cataracts prison doctors refused to treat. He received no visits throughout his incarceration. Over the years Kim was beaten, starved, tortured, threatened with execution and watched his fellow prisoners die at the hands of South Korean government agents yet he did not capitulate.

The 70 year old Kim was released as a "gesture of reconciliation" by the South Korean government, along with over 1,800 other political prisoners. Until his release Kim had never seen a television or used a flush toilet. Kim commented upon his release: "They say that when you hammer steel, it only gets harder. Well, when you hit people, you just turn them into enemies, and they become stronger."

When skeptical reporters asked Kim if his faith in communism was shaken by events in Eastern Europe and developments in South Korea he was nonplused. When driven through Seoul, the South Korean capital, he was not overawed by the highways or skyscrapers. "It's changed so much that I don't recognize any of it. But this kind of thing doesn't impress me, because there are still a lot of poor people. These tall buildings are the labor of poor people. Did you ever see any rich people digging on a construction site? The fight against poverty goes on." ■

WA DOC Gets \$745,366,000

by Paul Wright

In the August, 1995, issue of *PLN* we discussed the myriad anti-prisoner and -defendant legislation passed by the Washington State legislature in its 1995 session. The 1995 session was the longest in state history, running several months past its scheduled closing. Because the legislature squandered its time and resources on such pressing issues as prison weight lifting it did not pass a budget until the end of the session. The Indeterminate Sentence Review Board (ISRB) received \$2,285,000 for the 1995-97 biennium. So rumors to the contrary, the ISRB will be with us for at least another two years.

In 1993-95 the WA DOC received \$680 million in operating funds. For 1995-97 the DOC received its largest budget in history, getting \$745,366,000, which constitutes 4.5% of the state's total budget. This is despite all the talk about budget cutting and cost saving in the prison system on the backs of prisoners. Barely addressed by the budget or any legislation is the fact that 72% of the DOC's budget goes to pay staff salaries/benefits and that the Washington DOC has the second highest staff to prisoner ratio, 1 staff to 1.8 prisoners, in the country. The budget states that the DOC "shall accomplish personnel reductions with the least possible impact on correctional custody staff, community custody staff, and correctional industries." It is unlikely any trimming of the bureaucratic pork at DOC headquarters will take place.

In breaking down the budget, the DOC's institutional services will get \$538,443,000 and community corrections will get \$161,694,000; correctional industries will get \$6,833,000 with interagency payments of \$12,446,000. Specific funds were appropriated for the following projects: \$11.7 million to pay for an increase in the DOC's prison population, which is forecast to grow by 1,177 prisoners to a total of 12,430 at the end of 1997; \$15.5 million for community corrections prisoners which is expected to grow by 6,930 people to total 56,820 active cases; \$1.4 million to bring another 512 beds at Airway

Heights on line in January, 1997; \$1.9 million to open a 40 bed work release in Kitsap county; \$524 thousand to open a pre-release in Yakima; \$2 million for medical inflation; \$2.1 million is specifically designated for medical care at Purdy to meet the DOC's court imposed medical duties [See *PLN*, Vol. 6, No. 4]; \$4.7 million to pay for increased sentences as a result of I-159 (hard time for armed crime) and HB 2010; \$352 thousand is provided to hook up Monroe and WCCW prisons to city water supplies.

The DOC budget envisions about \$15 million in "savings." Much of this is nothing more than accounting sleight of hand, such as eliminating the state capitol vehicle parking account; shifting funding for the TRCC sex offender treatment program from the general fund to the Violence Reduction and Drug Enforcement Account; costs associated with the commissary and extended family visits are moved from the general fund to the Institutional Welfare/Betterment Account; and emergency travel funds given to the DOC in 1993-95 are shifted to a different account. So on paper these "shifts" will result in some \$3 million in "savings", of course the money will still be spent, just from different accounts.

Some areas of funding are specifically reduced. The budget states it will reduce by 50% funding for prisoner recreation services which is a cut of \$3.03 million; \$222 thousand reduction for religious and psychiatric services; funding for drug treatment was reduced by \$1.7 million. Some of the "savings" are merely projected or hoped for with no real likelihood any such savings will in fact materialize. \$590 thousand was a projected savings to contract out drug testing and to reduce the frequency of drug tests; \$192 thousand in consolidating the WSR and TRCC mailrooms and consolidating external prisoner transport at those facilities; \$330 thousand from requiring prisoners to pay \$3 each time they seek medical attention; \$500 thousand in so called "health care cost containment" which includes "application of reimbursement methodologies, inpatient hospital bill audits," etc.; and \$1.2 million in so-called "education efficiencies" where prisoners are made to pay for their schooling.

Some of the "savings" are merely delaying expenses. \$4.4 million is to be saved by not hiring community corrections staff four months than earlier projected; \$2.6 million by decreasing the frequency of contacts community corrections officers (i.e. parole officers) have with their charges; \$1.5 million by reducing tower staffing; \$1.9 million by changing the classification of two MICC units from medium custody to so called "long term minimum" custody prisoners. It should be realized that prisoners' classification levels are solely for the DOC's benefit in determining staffing levels at various facilities.

To put the current DOC budget into perspective, in 1983-85 the DOC budget was \$282 million for some 7,000 prisoners. In 1999-2000 the DOC projects a \$946 million budget. Readers should note that these figures include only the DOC's operational budget. Its building budget for the construction of new prisons is a separate account for which it is projected to receive an average of \$130 million per biennium from 1995 through 1999. ■

Surveys

📁 Prisoners Convicted by Drugging is conducting a survey to determine the number of criminal defendants who have gone to trial or been tried while they were under the influence of psychotropic drugs. Anyone desiring a questionnaire should write: B. Buechler, 825 Battery St. 1st Fl. San Francisco, CA. 94111.

📁 I am seeking input from other prisoners dealing with their conditions of confinement by means of a questionnaire. Once I've compiled the answers I will produce a pamphlet which will be available to prisoners and which will give ideas on how to improve their surroundings. Anyone interested can get a copy of the questionnaire from: Peter Wermuth/David Sheldon, C/O Prisoners Pamphlet, 59 East Van Buren, Rm. 707, Chicago, IL. 60605. ■

WSR Prisoner Murdered by Neglect

On December 12, 1994, Stanley Watson died of a heart attack at the Washington State Reformatory (WSR) in Monroe, WA. While heart attacks do happen and can be fatal Watson's death could have been easily prevented, so easily that his death amounts to negligent homicide. On December 11, 1994, Watson went to the WSR hospital on two separate occasions complaining of chest and back pains. The first time he was given no treatment whatsoever by Dr. Meloche. Watson was given an appointment to see a physician's assistant the next day, but he would be dead by then. He was told to return to the clinic if his symptoms got worse.

The second time he returned that day he was seen by nurse M. Yeager. He complained of continued chest pain, and classical heart attack symptoms. He was given nitroglycerin and Nifedipine and sent back to his cell. The next time Watson was seen by WSR medical staff it was in response to Watson's collapse at his work place, the kitchen, from where his lifeless body was transported to Valley General Hospital. Efforts to resuscitate him were unsuccessful and he was pronounced dead at 8:11 AM on December 12, 1994.

That would have probably been the end of it except that a complaint was filed with the Department of Health (DOH), supported by affidavits from two prisoners to whom Watson, in the last hours of his life, had complained to about not receiving appropriate medical treatment. The DOH initiated an investigation that revealed shoddy treatment and gross negligence.

On March 8, 1995, the DOH issued its final report. The final summary of the five page report states: "Documentation in the medical record did not meet Washington State Reformatory infirmary standards as evidenced through lack of dated entries and orders, missing authentication of entries and failure to record self-administered medication distribution."

"Appropriate follow through with inmate's hypertension and medication was not documented in the inmate's medical record."

"Facility did not have policies/procedures/protocols for handling of the life

threatening emergency of myocardial infarction." [i.e. a heart attack]

"Facility lacked documentation of appropriate licensure and CPR/First Aid of two personnel involved with inmate's care. See statement of deficiencies."

The statement of deficiencies of the WSR hospital is four pages long. Watson was given an EKG on the eleventh. The DOH states: "...it was learned that at the time of the inmate's death, it was policy to have EKGs read by a computer. The computer system was old and had a history of significant problems in accurately interpreting EKGs. No qualified staff read the EKG that was completed in the clinic on 12/11/94. The EKG was determined 'normal' by the computer when it was not normal. This policy and practice did not support safe care."

"Two of the four personnel involved with the investigated case did not have current licenses on file at WSR. One was a physician assistant and the other a Registered Nurse. The PA license on file had expired on 9/9/93 and the facility had no verification of any license for the RN."

"Three (3) of four (4) medical personnel attending the deceased inmate did not have documentation of current CPR/First Aid. During this complaint investigation, a notice was observed posted in the infirmary nursing station asking how many staff needed CPR/First Aid updates. Six (6) of the seven (7) names of those responding stated they needed an update."

"The facility did not have protocols/procedures for the assessment, care and transfer of inmates who might be at risk for infarction. This patient showed typical symptoms of MI. No assessment except vital signs was documented on the first clinic visit of 12/11/94. Differential screening was done on the second visit including administration of Nifedipine, nitroglycerin, monitoring of vital signs and a computer read EKG. All documentation, except the computer read EKG, suggested a possible MI, yet the patient was not transferred to a hospital where further assessment, not provided at the infirmary, could have been provided."

Despite having a history of hypertension he was given no follow up care upon arrival at WSR. "Documentation

and practice did not support continuity of care and physician orders for medications were not followed." Other problems with WSR medical records was that signatures were not legible, infirmary entries and medication records were not dated and not even the last two occasions Watson was seen at the hospital were the entries timed.

In their report, the DOH noted "None of the four medial personnel who attended SW were available for these surveyors to interview during the investigation survey." How convenient. One of the PAs who attended to Watson in his dying hours was PA Teodoro. According to a reliable *PLN* source, Teodoro began working at WSR after being "asked to leave" his prior place of employment at Fircrest, a home for the developmentally disabled, due to his inept care of patients there. Unfortunately for prisoners he's now been hired by the DOC.

Watson's death is far from unusual. In the July and October, 1994, *PLN* we reported on the murder of Gertrude Barrow. She was a prisoner at the Washington Corrections Center for Women who died after an ulcer ruptured. She was repeatedly denied medical attention by DOC medical staff and just hours before she died a DOC nurse was telling her to clean up her own vomit. What makes deaths like Barrow and Watson's all the more tragic is the fact that they were easily treatable and completely preventable. All that was required was a minimum of medical care. Instead a confluence of untrained, incompetent and, more importantly, uncaring, DOC medical personnel condemned these, and other, prisoners to death as surely as if they had pointed a gun to their heads and pulled the trigger.

Barrow's death resulted in settlement of a class action suit on WCCW medical conditions and significant improvement [See: *PLN*, April 1995]. The current DOC budget calls for a reduction in the amount spent on prisoner health care. This is in addition to recent legislation which seeks to charge prisoners \$3 each time they seek medical attention, of the type that killed Barrow and Watson. It is likely that this type of problem will only get worse.

Currently the ACLU is investigating the lack of adequate medical care at the Reformatory; this facility receives prisoners from other DOC prisons who have serious or complicated medical conditions. If you can supply documentation (grievances, letters from DOC officials, affidavits, etc.) showing inadequate medical care at the Reformatory you should contact the ACLU at: Julia Hampton, ACLU, 705 2nd Ave, Seattle, WA 98104.

Washington prisoners should also consider filing their complaints of inadequate or incompetent medical care directly with the Department of Health which, as shown above, does investigate credible claims and creates a good liti-

gation record for this type of incident. Complaints to the DOH should be in letter form, briefly state the facts (names, dates, places, etc.) of why the medical care was inadequate or deficient. You should support your complaint with affidavits from witnesses with first hand knowledge of the incident(s) and any other supporting evidence you may have. Once the investigation is completed you will be contacted and provided with a copy of the completed report. You can write DOH at: DOH, Facilities & Services Licensing, P.O. Box 47852, Olympia, WA 98504-7852. Prisoners in other states should consider a similar course of action with their state's medical regulatory agencies. ■

Medical Evidence Required to Win Delay Claim

The court of appeals for the eighth circuit has held that in order to prevail on an eighth amendment deliberate indifference to serious medical needs claim, the prisoner plaintiff must submit verifying medical evidence at the summary judgment stage. Larry Beyerbach, a Missouri state prisoner, caught his hand in a cell door as it was closing. About three hours later a nurse examined his hand, directed him to apply ice, gave him Tylenol for pain and recommended an x-ray. The next day Beyerbach's hand was x-rayed, which disclosed a broken bone. His hand was put in a cast and he received follow up treatment.

Beyerbach filed suit contending that the three hour delay before he saw the nurse, the two hour delay before he received the ice she ordered and the 17 hour delay between the time the x-rays were ordered and taken all constituted separate instances of cruel and unusual punishment. The defendants moved for summary judgment on qualified immunity grounds, which the district court denied. They appealed and the appeals court reversed.

To state a claim for a violation of the eighth amendment a prisoner must allege the deprivation of an objectively serious medical need and he must allege the prison official defendants

were, as a subjective state of mind, deliberately indifferent to the prisoner's health or safety. The court has held in the past that a broken hand can be viewed as a serious injury. See: *Robinson v. Moreland*, 655 F.2d 887 (8th Cir. 1981). "However, when the inmate alleges that the delay in treatment is the constitutional deprivation, the objective seriousness of the deprivation should also be measured 'by reference to the effect of delay in treatment.'" In *Hill v. Dekalb Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994) the court held "An inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed."

The eighth circuit has adopted the 11th circuit's reasoning in *Hill* and concluded that the lower court had erred in denying the defendants' motion for summary judgment because Beyerbach failed to present any "verifying medical evidence" of the adverse consequences of the delay in treatment. "Because such evidence is required for an inmate's claim to succeed,... Beyerbach's failure to meet this burden is fatal to his case." See: *Beyerbach v. Sears*, 49 F.3d 1324 (8th Cir. 1995). ■

Reader Mail

Murder at MI Parole Camp

On July 13, 1995 at the Michigan Parole Camp in Jackson, MI, six guards (5 white and 1 black) were involved in the strangulation/murder of prisoner Frank McBride.

A witness to the incident, Bryan Howard-El, was gathering names of prisoner witnesses. As a result of his courage he was written a major misconduct ticket for "Inciting a Riot." He was transferred to a maximum security prison and placed in segregation. He was found "not guilty" of the infraction, but remains at the maximum security Egeler Facility, undoubtedly because of what he knows about the murder.

The guard who wrote the major infraction on Howard-El is C/O Lew Conner. His wife, Evelyn Smith Conner, works at the Egeler Facility and has been spreading stories about Howard-El, to discredit him and provoke a violent attack by other prisoners on him.

The MI State Police and the MIDOC Internal Affairs have been called in to investigate the murder. Of course, there has been no media coverage (to my knowledge) of this incident. I have been informed that Mr. Howard-El had the courage to contact the murdered prisoner's family and let them know the truth as to how their son died. Naturally the MIDOC will attempt to cover up the murder and call it some kind of accident. After all, accidents do happen and guards claim qualified immunity.

It should be noted that many of the eye-witnesses of the murder were intimidated and threatened to keep silent. Those who were not were transferred to other facilities. No doubt unless media exposure is put on this issue, those who stood up will receive harassment and other abusive treatment. However, the blood of Frank McBride is still fresh and his story has to be exposed to those who care about the truth.

Unless we stand together to stop this type of inhumane treatment against prisoners, more Frank McBrides will fall, more cover-ups will happen, and the more arrogant the MIDOC and their goons become. Any witnesses should write out a statement and send it to the Michigan States Attorney General.

-- A.A., A MIDOC Prisoner.

Alaska Prisoners in Exile

by Anthony Brown

I would like to respond to a News in Brief segment of your February 1995 issue of *PLN* concerning the shipment of Alaska state prisoners to the Penal Detention Center [a private prison operated by the Corrections Corporation of America] in Florence, AZ, supposedly to ease overcrowding and avoid fines levied by the court for violating population caps.

Briefly, some history... Prior to 1988, Alaska had no facilities for housing long-term felons, and the DOC routinely shipped prisoners with ten years or more to serve on their sentences to prisons outside of Alaska. Most, like myself, were designated to federal prisons, although some went to other state's facilities in accordance with the Western Interstate Compact Agreement.

This policy of exile for long-term prisoners ended in 1988, with the completion of the Spring Creek Correctional Center in Seward. Spring Creek, Alaska's only maximum security prison, was built in response to a 1986 Partial Settlement Agreement (*Cleary, et al. v. Smith, et al.*, 3AN-81-5274 Civ.) in which the DOC agreed to return all Alaska state prisoners in federal custody who desired to return. This was the same agreement containing population caps that the DOC was found to be violating and was fined \$5,500 per day.

As noted in your News in Brief, the DOC originally claimed that the prisoners slated for transfer to Florence, AZ, were sex offenders who had refused treatment, who had bombed out of treatment, or who had sentences too long to be treated now. In reality, only a small number of the 207 prisoners sent to AZ fit this category. Most of them are the same long-term prisoners, convicted of murder, robbery, assault, fraud, etc. who would have been exiled under the past policy. Indeed approximately 170+ of the prisoners now in AZ came from the Spring Creek prison and many of the beds that became available are now being filled with medium security, short and medium term prisoners.

The DOC also claimed that these transfers were a "temporary" measure necessary to ease overcrowding, but the transfers barely bring the DOC into compliance with the agreed population caps, while the Department's own estimates are that 225+ new prisoners will be entering the system during the next year. Where are those prisoners going to be housed? It is true that the DOC and the city of Anchorage have conducted public hearings on the construction of a combination jail/prison facility, but, even if approved, that facility is still 3-5 years out. It doesn't take a rocket scientists to figure out that the next 3-5 years will add an estimated 675-1,125 new prisoners to the system, so any facilities made available in that time are already over-booked! [Editor's Note: According to data published in *Corrections Compendium*, Alaska has \$0 budgeted for prison construction in its 1994-95 budget, and the AK DOC's own projection of prison population increases are: 1996, 12.86% over the current population of 3,329; 1998, 43.74% over the current population; 2000, 68.91% increase over the current population. That means within five years Alaska will have to build prison beds for an additional 2,294 prisoners. So the question of where these prisoners will be housed looms large.]

The truth is that the DOC has once again established a process to banish long-term prisoners thousands of miles from their families and communities, a process they will not relinquish without force of another court action such as *Cleary*. I also believe that the prisoners who have already been shipped to AZ will not return until their sentences are completed, or the Corrections Corporation of America deems it more costly than profitable to keep them. Further, I suspect that the next word on this matter from the DOC will be to express a need to increase the number of prisoners that may be shipped out of state.

Face it, placing long-term prisoners in private owned prisons is cheaper than building, operating, and maintaining new maximum security prisons in Alaska. [Editor's Note: According to 1993 Dept. of Justice figures, AK has the highest "cost per prisoner" operating

expenses of any of the 50 states. According to more recent data published in *Corrections Compendium* Alaska is second only to Hawaii.] Sending prisoners to out-of-state prisons also allows the citizenry to return to that comfortable "out of sight out of mind" mentality; the politicians get to add "exile" to their repertoire of punishments, together with already notoriously long presumptive and mandatory minimum sentences; and the DOC gets to bail out of some current litigation, and avoid future actions, concerning in-state conditions including, its failure to promulgate regulations in accordance with the *Cleary* Settlement Agreement and departmental structure, the lack of educational and vocational programming, and its general failure to rehabilitate, because those with enough time to actually litigate such issues can now be shipped to confused jurisdictions far from ombudsmen, court monitors, and legal counsel. ■

SC Takes Weights

Joining Wisconsin, Mississippi and Arizona the South Carolina DOC banned weight lifting in its prisons in early July, 1995. All weight lifting equipment was removed from that state's prisons and will be made available to prison guards and students at the state Criminal Justice Academy. Prior to this South Carolina had banned personal clothes for its prisoners and mandated short haircuts and no facial hair, abolished furloughs and imposed other regressive measures. Prisoner protest has already included the stabbing of several guards, a hostage taking and litigation [See *PLN*, July, 1995.]

Other states and Congress are currently considering imposing similar bans on prison weight lifting. As a result of legislative measures (SB X22) which forbid prisoners from lifting weights in order to gain muscular bulk or strength, the California DOC has enacted administrative measures that prevent prisoners from lifting more than 165 lbs. on bars or dumbbells with more than 75 lbs. Prisoners will be limited to one hour of weight lifting a day and be required to pass a medical "exam" every 90 days. [Editor's Note: The March, 1995, issue of *PLN* had an article exposing the politics behind efforts to ban weight lifting, copies are still available for \$1.] ■

Nevada DOC Psychologist Moonlights as Pimp

In the July, 1994, issue of *PLN* we reported the saga of William Knapp, the chief psychologist of the Nevada DOC whose ambition was to open up a Western theme brothel. We mentioned the case, *Knapp v. Miller*, 843 F. Supp. 633 (DC NV 1993), as a somewhat humorous aside to our generally dry legal coverage. Knapp was suing because he was fired from his DOC job after his brothel business was reported in the local media. Dr. Knapp is quite the litigator with at least three published rulings to date on the matter.

The latest ruling, from the Nevada Supreme Court, is of interest to prison activists beyond the rather amusing nature of the litigation. It turns out that Knapp was using prisoner slave labor to promote his brothel business. The Nevada DOC has a hobby program where businesses and, apparently, staff members, can hire prisoners at token wages to perform various tasks. In this case, Knapp hired prisoners to stuff envelopes, type labels and do mailings promoting his brothel (which would also include a bar and casino as well). The mailings also contained discount coupons for prospective customers. Knapp claimed that his DOC superiors knew of his brothel business and use of prison slave labor and approved of it but did not fire him until after the media reported it.

Knapp's duties for the DOC included working as a forensic evaluator, reporting to the parole board on prisoners' potential for recidivism, providing substance abuse education and doing stand by crisis intervention. We duly note that prostitution and bordellos are legal in Nevada and Knapp's activities were legal. Yet this raises the question of prison employees being able to hire prisoners as wage slaves to promote their business interests. While the negative press has focused on the fact that Knapp was going to open a brothel they have ignored the more serious ethical question of whether someone in Knapp's position, and DOC employees in general, should be able to hire prisoners to work for them especially when, as in this case, their release may well directly hinge on

a recommendation from their employer. By the way, Knapp got his job back. See: *Knapp v. State Ex Rel Dept. Of Prisons*, 892 P.2d 575 (S.Ct. NV). ■

TX Death Row Protest

On June 28, 1995, two wings of Texas death row prisoners demonstrated for an hour against a scheduled execution. The prisoners shouted, set fires and banged on the bars. The execution was stayed by a court order. One hundred prisoners have been executed in Texas since 1982, by far more than any other state. Some 400 prisoners sit on death row in Texas. In late June the prisoners announced they would embark on a "chain" hunger strike to protest the death penalty. Their demands include a moratorium on all U. S. executions and an investigation into the racist and anti-poor application of the death penalty. In the strike pairs of prisoners fast for three days each. They join the indefinite liquid-only fast begun by death row activist Gary Graham on June 21, 1995, and joined by four other death row prisoners on July 21, 1995. So far the corporate media has ignored the protest.

Organizing under the name of the "Death Penalty Revolution," death row prisoners, 63 as of August 17, 1995, have signed a "pledge of revolutionary resistance" to refuse to walk obediently to the death chamber should all their appeals fail. One recently executed prisoner carried out his pledge, forcing guards to subdue and drag him to the death chamber.

On August 16, 1995, a group of New African and Latina women with loved ones on death row announced they would be joining the liquid-only chain hunger strike. The women have set up a site in a park across from the death chamber in Huntsville, TX, some 90 miles north of Houston. They have also held protests in front of the federal courthouse in Houston. Anyone desiring more information should contact: Death Penalty Revolution, P.O. Box 280507, Houston, TX. 77228. They want contact with death row prisoners and activists in other parts of the country. ■

Source: *Workers World*

Feeding at the Trough

The highest paid state employee in California isn't the governor, it is Darryl Andrade, a DOC lieutenant at the Avenal State Prison who earned gross wages of \$108,989 in 1994. Andrade was one of 702 California prison guards, sergeants and lieutenants who made more than \$75,000 in 1994. The DOC had 1,282 employees making more than \$75,000 a year, more than any other state agency. The DOC spent more than \$146 million on overtime in fiscal year 1993-94, \$52 million more than was budgeted. Prison guards can, and do, double their wages. Andrade's regular salary was \$57,658 in 1994 but he earned another \$38,123 in overtime and the rest in yet more overtime compensation. Leonard Sims, a guard in the DOC transportation unit, earned \$44,152 in regular salary and boosted his wages with another \$52,164 in overtime pay.

While many state programs have been slated for budget cuts, prison budgets, driven in large part by high base salaries and excessive overtime, have virtually exploded. In 1980 the CDC budget was \$300 million; by 1995 the proposed budget was \$3.7 billion, a 1,141% increase. The CDC had 7,570 guards in its employ in 1985, by 1995 that number had tripled to about 22,000. California guards start out earning \$24,012 a year. Within seven years they earn \$46,044 a year. Lieutenants make \$59,628 a year, far more than comparable ranks in the state highway patrol which has higher training and educational requirements.

State Department of Personnel chief, David Tirapelle, states that overtime is cheaper than hiring more guards where benefits and retirement packages can total up to 35% of a person's salary. Bernie Orzoco, a consultant to the legislature's prison operations committee stated that after a recent visit to the Pelican Bay prison he saw an armed guard in the prison's segregation unit who "looked horrible" after working more than 16 straight hours. While politicians want to charge prisoners a few dollars to seek medical care or use other basic amenities, hundreds of millions of dollars are being squandered without a word of complaint on exorbitantly paid staff. Staffing costs take up around 75% of the operating costs of most prisons. [For additional information on this topic see the March, 1995, *PLN*. Copies are available for \$1.00] ■

Old Friends Only

by Adrian Lomax

The public pays \$25,000 a year to keep each of Wisconsin's 9,500 adult prisoners locked away. Part of what society expects to get for that considerable investment is prisoners who are changed for the better by the time they get out.

One of the changes I've undergone during my stay in prison is that I have an entirely different circle of friends now. Over the course of fourteen years, I've lost touch with almost everyone I knew, other than family members, before I got locked up. My current acquaintances are an entirely new group, people from the outside who've taken an interest in my activities and ended up developing friendships with me. Given the sort of friends I associated with before coming to prison, the change is certainly a positive development.

That process of exchanging new friends for old is common to people who serve long prison sentences. But Gary McCaughtry, the warden at Waupun, has decided he no longer wants that process to work its course. Early this year, McCaughtry imposed a new rule saying that prisoners could receive visits only from people they knew before coming to prison.

For prisoners who mixed only with what some call "the criminal element" when they were on the streets, McCaughtry's rule guaranteed that they could not upgrade their choice of friends during their incarceration. Many religious groups, in accordance with the tenets of their faith, make a practice of visiting prisoners. McCaughtry's rule put an end to that. The rule also prevented prisoners from seeing children, grandchildren, nieces and nephews born after an inmate's prison term began.

For the past several months, people who submitted requests to have their names added to the approved visiting lists of Waupun prisoners were having those requests denied on the grounds that the would-be visitors had not known the prisoner prior to his incarceration. It's well accepted that building connections with the community is vital to prisoners for turning their lives around, but

Waupun officials deliberately turned away community members who wanted to visit, relegating prisoners to the company of their fellow convicts.

In addition to being absurd, McCaughtry's rule is illegal. State law expressly says that knowing a prisoner prior to incarceration is not a requirement for being approved to visit. Waupun prisoners filed numerous administrative grievances pointing out the rule's illegality, but prison officials, as always, paid no heed to the law or inmate complaints.

Fortunately, Madison attorney, Gillam Kerley filed a civil-rights lawsuit on behalf of a woman who'd been denied permission to visit a Waupun inmate. McCaughtry's rule was recently scrapped as a result of the suit, and the visitors who'd been turned away have now been allowed into the prison. But it took a lawsuit to force McCaughtry to do what he should have been doing all along.

Because McCaughtry violated the civil rights of inmates and visitors by illegally denying permission to visit, the Department of Corrections must now pay Kerley's legal fees of three to four thousand dollars. State officials probably spent a like amount paying the lawyers who represented the DOC in the case.

So why on earth would the warden of Waupun impose a clearly illegal rule, discourage inmate contact with the outside world, and waste thousands of tax dollars defending such an illegal and misguided policy? Because that happens to be standard DOC operating procedure. I've witnessed prison officials play out the exact scenario time and time again. They enact oppressive, arbitrary and illegal rules that make no sense and actually work against the rehabilitation of prisoners. Then they refuse to abandon the rules until someone goes to the trouble and expense of convincing a judge to order the agency to fly right.

DOC officials feel free to manage their agency incompetently because they are subjected to almost no scrutiny. Any criticism of prison administrators tends to get dismissed as being soft on criminals. That's ridiculous, though, since no one in the public discourse these days advocates making things easy for pris-

oners. The public definitely needs to increase its awareness of what's going on within the DOC to ensure that our huge investment of tax money in the prison system is being administered in a manner designed to benefit society by rehabilitating offenders. Absent that sort of public scrutiny, Wisconsin prison officials are currently running amok. ■

**Do you have a friend
or family member in prison?
If so, a subscription to *PLN*
would make the perfect
holiday gift!**

AL Adds Rock Breaking to its Repertoire

Recent issues of *PLN* have reported on plans by the Alabama Department of Corrections to dress alleged exhibitionist prisoners in hot pink outfits, to reinstitute chain gangs and to chain those prisoners who refuse to work on the chain gangs to steel rails outdoors. Apparently these measures aren't enough to project Alabama's "tough on prisoners" image. On July 29, 1995, Ron Jones the commissioner of state prisons, announced plans for Alabama prisoners to begin breaking large rocks into pea sized pellets. The rocks will be trucked into at least three prisons so that 160 chained prisoners can break them up just outside the prison gates. The plan calls for the prisoners to work ten hours a day, five days a week.

The sole purpose of the program is to increase the punishment for prisoners. State highway officials say they have no use for the crushed rock. So it's good to see that the state of Alabama has so much money to spend that it can afford to pay to have big rocks trucked into its prisons to be broken up into little ones by prisoners with sledgehammers. The rock-breaking was scheduled to begin in early August. ■

New Statewide Data Show Prison Rape a Widespread Problem

Over a fifth of male prisoners are sexually victimized behind bars according to a newly released survey of an entire state's prison system. A summary of results from the spring, 1994 survey, which covered all four Nebraska prisons and was conducted by University of South Dakota psychology professor Cindy Struckman-Johnson, was obtained from inside the prison by the Nebraska Civil Liberties Union and released by the Stop Prisoner Rape, Inc, a national group, after verification.

According to the 5-page summary of the survey results, 22.3% of the males indicated they had been "pressured or forced to have sexual contact against your will." The figure for the woman's prison was 7.7%. Most of the victims provided written accounts of the incidents.

This was the first comprehensive survey on sexual assault in a prison since 1980 and the first ever to look at an entire state, said Stephen Donaldson, president of Stop Prisoner Rape. Donaldson said that extrapolating the Nebraska results indicated an annual sexual victimization of 200,000 adults in the nation's prisons, including 120,000 completed rapes of adult males. Adding a separate extrapolation for the nation's local jails and an estimate for juvenile institutions, Donaldson arrived at an estimated total of 359,000 annual male prisoner sexual assault victims (242,000 of whom were actually penetrated), plus around five thousand female victims. Because of very high repeat rates, he said, this amounted to over 80,000 sexual assaults a day behind bars. The national prisoner population, including jails and juvenile institutions, is nearly one and a half million, he said. For comparison, a 1993 household survey by the U S Justice Department yielded an estimate of 160,000 completed rapes in the community. Donaldson noted, though he termed it a likely underestimate. He said that published studies had shown that nonviolent and less serious offenders tended to be singled out for sexual assaults by more hardened convicts.

The U.S. Supreme Court ruled unanimously June 6, 1994 in *Farmer v. Brennan* that prisoners could bring civil rights suits against prison officials who do nothing to prevent rapes

under the "cruel and unusual" punishment clause of the Eighth Amendment to the Constitution.

Most of the victims were heterosexual; white, were repeatedly victimized, and reported "serious bad effects" from the rapes, but told no one about it, according to the survey summary, which was made available to Nebraska prisoners under an agreement with the researcher, though prison officials sought to prevent it from reaching the public, Donaldson said. Over five hundred filled out and mailed questionnaires to Prof. Struckman-Johnson, who tabulated the results and provided summaries for distribution to the prisoners under an agreement with the state Department of Corrections.

"The rape situation is likely to be even worse in states more urbanized than Nebraska," Donaldson commented. "This is the best scientific data ever collected on rape in prison, which can amount to a death penalty in the age of AIDS," he said. Donaldson noted that White House AIDS Czar Patricia Fleming recently termed the rape issue a "critical one" in correspondence with him and pledged to work with the Justice Department and federal Bureau of Prisons on AIDS prevention efforts.

Most of the victims added written accounts of the "worst incidents" to the standardized questions and answers. Victimization figures turned out to be close to estimates made by both prisoners and staff. A little over a quarter of the victims said they were only victimized once, two-thirds indicated repeated victimization, and the rest did not specify.

Asked to name the most serious act involved, over half of the males pointed to anal penetration, 8% listed forced oral sex, 14 percent "genital contact" and an equal number specified attempts. Half the incidents involved a single perpetrator, while a tenth involved groups of six or more assailants. Prison staff was reportedly involved in a fifth of the incidents. Force was used in over three-quarters of these incidents, and weapons in over one-quarter, and injuries resulted in nearly a third.

Among the aftereffects of the incidents were depression (reported by 62% of the victims), flashbacks or nightmares (42%), suicidal thoughts (38%) and lasting physical injuries (17%), according to the summary. Most of the victims indicated

they had told no one about the incident, while about a fifth had disclosed it to counselors, clergy, or prison staff.

Asked to suggest solutions, prisoners most favored keeping likely targets segregated from predators, followed by sexual visits and single cells; staff members (who filled out a separate survey questionnaire) favored more staff hiring, followed by separation of targets from predators and single cells. Prisoners did not generally list "protective custody" as a solution, though staff did. Donaldson said this discrepancy was significant, since prison administrations rely on "protective custody" (a form of administrative segregation) while the prisoners most directly affected, along with this organization, believe it to be ineffective. "Protective custody," he said, "in reality punishes the victim for reporting assaults to the authorities, and often does not even protect them."

Both staff and prisoners agreed in favoring stricter penalties for perpetrators and programs to teach prisoners about rape prevention.

Nebraska's women's prison was included in the survey, with 3 of the 39 women responding stating they had been sexually victimized in that prison. Donaldson said this was the first data on female victimization behind bars ever obtained. "Genital touching" was reported involved in two cases and an attempt in the third.

The most important reason why victims did not tell anyone about the incident was fear of retaliation by the perpetrator(s). Other reasons given were a feeling that staff would not believe them, fear of a misconduct report, aversion to "protective custody," shame and embarrassment, and the belief that nothing would be done.

Stop Prisoner Rape also released a new edition of its statistical report to take the Nebraska study into account.

The survey, which was conducted in March and April, 1994, was financed by the researchers themselves. The prisoner response rate was about 30%, considered excellent for a survey of this type. The survey did not attempt to elicit information about the extent of voluntary sexual conduct.

For more information contact: Stop Prisoner Rape, Inc (SPR), P.O. Box 2713, Manhattanville, New York, NY 10027-8817 (212) 663-5562. ■

OH Visitor Search Illegal

The Franklin County Court of Appeals in Ohio has held that an anonymous letter alleging drug smuggling by a prison visitor is insufficient to constitute "reasonable suspicion" which would authorize a strip search of the visitor. Terry Morris, the warden of the Chillicothe Correctional Institution, received an anonymous letter from the wife of a prisoner. The letter claimed that the author had seen Christine Wise give drugs to her husband in the prison visiting room. Based on this letter Morris ordered that Wise be strip searched the next time she came to the prison to visit her husband.

Wise arrived at CCI on March 10, 1991, to visit her husband. Prison guards told her that she would have to submit to a strip search in order to visit, if she refused the search her visiting privileges would be suspended for 90 days. Two female prison guards observed Wise undress, searched her clothes, inspected her mouth, underarms and asked her to bend over in order to inspect her vagina and anus. Wise was also forced to cough and squat three times. No contraband was found. Wise initiated a civil suit for money damages in the Franklin County Court of Claims against the Ohio Department of Rehabilitation and Correction. After a trial, the court held that Morris had "reasonable suspicion" to order the search and entered judgment in favor of the DRC. The court of appeals reversed and remanded for a determination of damages.

Federal courts have held that strip searches of prison visitors violate the fourth amendment if they are conducted without meeting the threshold standard of reasonable suspicion, which is a lower standard than probable cause. See: *Hunter v. Auer*, 672 F.2d 668 (8th Cir. 1982). [The February, 1995, and March, 1994, issues of *PLN* had several articles on the rights of prison visitors. Both issues are still available for \$1.00.] The Ohio legislature has codified this requirement at R.C. 5120.421(D). "Regardless of the laudable purpose and necessity of preventing the smuggling of weapons or drugs into a prison, the state does not have the unfettered right to strip search a prison visitor, but must be able to ar-

ticulate some credible evidence that would lead an objective observer to believe that 'a deadly weapon, dangerous ordnance, drug of abuse, or intoxicating liquor' is being transported into the prison."

The court held that, as a matter of law, the anonymous letter in this case does not constitute "reasonable suspicion" to authorize a strip search. In this case Morris undertook no investigation and the only corroboration was the fact that Wise appeared for her regular visit, "a fact which could have been known by a spiteful person seeking to cause her trouble. The details of the letter describing a regularly used method for passing drugs does not corroborate reasonable suspicion against plaintiff, since it is also subject to lack of corroboration tying her to that method. An anonymous letter writer could as easily have obtained information about this method from her own inmate husband, from something she read, or from observing someone else transporting drugs. These details do not provide the required additional corroboration. The end result is that the information provided the warden was only as reliable as the person who authored the letter. Since she was anonymous, there was no corroboration sufficient to supply the reasonable suspicion required by R.C. 5120.421(D) Commonly known details of a method of smuggling add little, if anything, to the accusation of an unknown tipster. The details do not 'self authenticate' the anonymous letter so that it alone may provide the reasonable suspicion against plaintiff." This constituted reversible error.

The trial court had held that the strip search at issue in this case was not an intrusion that would be objectionable to a "reasonable" person. "We differ with that finding, as we believe the general Assembly did in its enactment of R.C. 5120.421. If there was a violation of R.C. 5120.421(d) by the failure of the state to comply with the reasonable suspicion standard prior to this search, as we have held that there was, it was an invasion of privacy, since it was an intrusion that is objectionable to a reasonable person." The lower court erred by finding that the

statutory violation did not amount to an invasion of privacy compensable by appropriate damages. See: *Wise v. Ohio Dept. Of Rehabilitation & Correction*, 97 Ohio App.3d 741, 647 N.E.2d 538 (CA OH 1994). ■

Sexual Abuse in Vermont Prisons

Lawyers from the ACLU's National Prison Project filed a motion in federal court on August 25, 1995, asking the judge to issue a preliminary injunction to end physical and sexual abuse of prisoners in Vermont's sex offender behavior modification program. Affidavits filed by several prisoners allege that a treatment provider forces prisoners onto all fours and physically restrains them, simulates raping them anally, and screams obscenities at them.

Vermont's behavior modification program for sex offenders allegedly includes other techniques which the NPP is challenging as unconstitutional. According to the complaint filed in the case, these include forcing prisoners to masturbate while tape-recording their "deviant" fantasies, and playing the masturbation audiotapes in group sessions of other prisoners and staff.

Margaret Winter, a Prison Project lawyer, says that, "The plaintiffs will present evidence that there is no scientific support for such treatment as a means of reducing recidivism." According to Dr. Fred Berlin, an international expert on the treatment of sexual disorders and founder of the Sexual Disorders Clinic at John Hopkins, "If therapy is to be successful, it must teach the participants to respect others by, in turn, respecting them as human beings, this will not be achieved through demeaning treatment, offensive language, and crude posturing." ■

Qualified Immunity for Hearing Officers

The second circuit court of appeals has reaffirmed that prison disciplinary hearing officers are only entitled to qualified immunity, not absolute immunity from suit. As part of a pilot project the New York Department of Corrections in 1986 instituted the Inmate Hearing Officer program whereby the DOC hires private lawyers to serve as hearing officers at prison disciplinary hearings. The objective of the program appears to be to give the hearing officers independence from prison authorities.

Based on this appearance of independence the DOC has argued that hearing officers under this program are entitled to absolute immunity from suit. In a series of unpublished opinions, the federal district court has granted these hearing officers absolute immunity from suit. The court of appeals for the second circuit has reversed, holding that these hearing officers should receive only qualified immunity.

As a general rule only judges, prosecutors, witnesses in trials and

legislators receive absolute immunity from suit. In *Cleavinger v. Saxner*, 474 US 193, 106 S.Ct. 496 (1985) the supreme court held that Bureau of Prisons hearing officers should receive only qualified immunity for their actions because they did not perform judicial functions nor were they independent decision makers. The second circuit recently held that the New York DOC official who ruled on prisoner disciplinary appeals was not entitled to absolute immunity, see: *Young v. Selsky*, 41 F.3d 47 (2nd Cir. 1994).

Attorneys chosen for this program are paid by the DOC and are chosen from civil service lists. The court noted that the attorneys are not randomly selected but that the DOC selects the attorneys it will employ as hearing officers. The court discussed the *Cleavinger* factors in whether the hearing officers in this case were entitled to absolute immunity and found the factual situation to be very close to that in *Cleavinger*.

The court held that the relative absence of procedural safeguards (i.e. no right to counsel or cross examination of witnesses, no subpoena power, etc.) and procedural formality all weighed against granting absolute immunity. Likewise, the attorneys selected are not independent hearing officers as they are selected by the DOC and the DOC may discontinue the program at any time. Thus, the DOC has a degree of control over the hearing officers' terms of employment. The court also noted there is no type of compendium of records of disciplinary hearings or appeals and thus no way to apply precedent, i.e. similar factual situations may lead to different results depending on the hearing officer. Lastly, the level of appellate review available does not rise to the level appellate safeguards available in judicial processes where absolute immunity is afforded. The court notes that the sole individual assigned to hear disciplinary appeals is employed by the DOC and is not himself independent. See: *Tulloch v. Coughlin*, 50 F.3d 114 (2nd Cir. 1995). ■

New Mexico Blood Money

For two days in February, 1980, New Mexico prisoners seized control of the state penitentiary in Santa Fe. When it was over, 33 prisoners were dead, hundreds more were hurt, the gym was burned to a shell and the cell blocks, offices and other areas were extensively damaged. Elected and appointed officials responded by appropriating millions of dollars for prison construction and reconstruction, settling a 3-year-old lawsuit on prison conditions with a consent decree affecting virtually every aspect of prison life, and starting to plan the defense against civil lawsuits for the prisoners' deaths and injuries.

About 540 prisoners and their survivors (of 1,157 prisoners at the time of the uprising) filed notices that they intended to sue. One-hundred-twenty-four cases were eventually filed over the years, and 77 of those were dismissed.

The state's risk managers and attorneys gave an early estimate that compensating damages to prisoners and their families could reach about \$4 million. So they schemed to limit this "potential liability" and eventually suc-

ceeded so well that \$2.1 million was left over from the fund set up to pay for prisoners' claims. The statute of limitations for such lawsuits has expired and the leftover millions have now been given back to the state.

The state's defense lawyers for these suits - which included five of the best-paid law firms in New Mexico - tried a variety of ways to keep the awards to prisoners and their survivors small. Two strategies were ultimately successful. Prison supply companies involved in "improvements" to the pen in 1979-80 were threatened with suits and agreed to pay 40% of each prisoner/survivor award.

The state also decided to negotiate and settle the prisoner suits, rather than go to trial, provided that the amount of the settlements and even their existence were kept secret by all parties.

A final report on the cases, issued by three of the law firms in June 1995, says this secrecy was critical because publicity would have made it "difficult to ever negotiate a cheaper settlement," and "If inmates learned that a settlement 'pot' of nearly \$3 million existed and that

settlement money could perhaps be obtained without the expense of a trial, it was feared that nearly every inmate in the Penitentiary might have filed a lawsuit."

Thirty-two wrongful death cases were settled for an average of \$19,956 each to the families. Fifteen personal injury cases were settled for an average of \$5,298 to each of the prisoners. These figures include whatever fees went to lawyers for the prisoners and their families. The state paid \$433,039 of the total settlements of \$718,065. The state's attorneys' fees for their total defense work averaged \$32,504 per case, not counting costs reimbursed for travel and other expenses.

2.1 million dollars in payments and interest from the state's insurance and supply companies is now a bonus for the state budget. As the state's lieutenant governor said, "We do believe this is a valuable history lesson, and something we should never forget." ■

Excerpted from: *Coalition For Prisoners' Rights Newsletter*, July 1995, PO Box 1911, Santa Fe NM 87504-1911.

Time Barred Dismissal Reversed

The court of appeals for the tenth circuit has held that a district court erred when it dismissed a prisoner's suit as being time barred when it was not clear from the face of the complaint if the applicable time limits had been tolled. David Fratus, a Utah state prisoner, filed suit in 1994 claiming that he was overcharged by a prison restitution order after he had broken and damaged various items of prison property in 1988. In 1989 Utah prison officials assessed Fratus with a restitution order for \$8,412.00 to pay for damaged windows and a TV set. For a year after the incident Fratus was confined in segregation where he had little verbal contact with other prisoners. He was later sent to the Utah state hospital for psychological treatment and spent approximately five months there.

It was not until December of 1990, while speaking to another prisoner, that Fratus discovered he may have been arbitrarily overcharged for the damaged items. Fratus collected restitution orders from other prisoners showing a wide divergence in charges for broken windows, ranging from \$44.64 to \$326,521. He alleges the windows he broke were identical in all respects to the windows broken by the other prisoners. He filed his lawsuit on April 24, 1994, claiming that the Utah DOC's practice of overcharging prisoners for damage to prison facilities violated his rights to due process and equal protection of the law. He also claimed he was denied due process by prison officials holding a disciplinary hearing outside his presence and when he was mentally incompetent. The district court dismissed the complaint as being "frivolous" under 28 U.S.C. § 1915(d) because it was time barred under Utah's four year statute of limitations. Fratus argued that the statute of limitations should be tolled for the period from 1988 to 1991 because he was mentally incompetent.

The court of appeals noted that district courts may dismiss an in forma pauperis complaint as frivolous only if it lacks an arguable basis either in fact or in law. Courts may dismiss a complaint on their own motion based on an affirmative defense only when that defense is clear from the face of the

complaint. "We hold that the district court improperly dismissed Mr. Fratus' complaint by raising sua sponte a statute of limitations defense that was neither patently clear from the face of the complaint nor rooted in adequately developed facts."

The court noted that it had recently held Utah's four year statute of limitations applied to § 1983 actions. See: *Arnold v. Duchesne County*, 26 F.3d 982 (10th Cir. 1994), [PLN, Vol. 5, No. 11]. This four year statute of limitations may be tolled if the plaintiff is mentally incompetent when the cause of action accrues. The appeals court held that the lower court had improperly resolved the issue of Fratus' mental competency because Fratus was not obligated to prove the validity of his factual allegations in his initial pleadings. The period the statute of limitations should be tolled is not clear from the face of the complaint.

The court also discussed when causes of action accrue (i.e. start the clock on the statutes of limitations). Generally, a cause of action accrues when a party becomes aware of the facts that would support a cause of action. Because comparison of restitution orders lies at the heart of Fratus' claim the court held that his cause of action did not necessarily accrue in 1989 when he was served with the restitution order but may have accrued at a later date when Fratus learned, or should have learned, that the prison arbitrarily charged him more than other prisoners for similar damages. The court held this was a fact question that the lower court prematurely decided in dismissing the complaint. "Accrual, like tolling, is a fact laden issue in the instant case." "Section 1915(d) dismissal on the basis of an affirmative defense which the district court raises sua sponte is reserved for those extraordinary instances when the claim's factual backdrop clearly beckons the defense. This is not such an instance." Because of the outstanding fact issues of Fratus' mental competency and when the equal protection claim arose, both affecting the appropriate four year window of viability, the lower court's error was magnified. The lower court ruling was reversed and remanded. See: *Fratus v. Deland*, 49 F.3d 673 (10th Cir. 1995). ■

Standard for Gender Discrimination Clarified

The court of appeals for the eighth circuit has held that heightened judicial scrutiny may be appropriate in equal protection claims brought by female prisoners. This ruling will be of special interest to female prisoners. Women prisoners in Iowa filed a class action suit contending their right to equal protection under the law was violated because the services they received were substantially inferior to those provided male prisoners in Iowa. After a bench trial, the district court dismissed the suit by holding that male and female prisoners are not "similarly situated" for equal protection purposes. It also held that the plaintiffs had failed to establish any basis of intentional discrimination by prison officials. The plaintiffs appealed and the court of appeals for the eighth circuit vacated and remanded.

The district court in this case held that it was bound by *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994) [PLN, Vol. 5, No. 12], a class action suit filed by women prisoners in Nebraska contending they received inferior programs and services compared to male prisoners in that state. After winning in the lower court, the eighth circuit court of appeals reversed by holding that there was no equal protection violation because male and female prisoners were not "similarly situated" for reasons such as institution size, average sentence length, and custody level. Thus, differences in programs and services were not probative of gender discrimination.

The appeals court in this case held that the lower court had not made sufficient findings of fact to conduct a meaningful appellate review. They remanded the case back to the district court for the entry of detailed findings of fact and conclusions of law based on those facts. The significance of this case is the manner in which the court distinguished *Klinger*, which will be useful to any female prisoners litigating gender bias claims.

"*Klinger* does not stand for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis, and the trial court erred in

concluding that *Klinger* necessarily rendered irrelevant the types of comparisons offered by plaintiffs. In this case plaintiffs took a different approach from the proof offered in *Klinger*. They focused on different programs available to men and women with the same types of custody classification and sentence length. They claim that differences exist for similarly situated inmates in such areas as access to a law library, rules concerning prisoner legal assistance, availability of furloughs and work release, access to educational programs and the amount of daily study time permitted, availability of behavior modification classes and sex offender therapy programs, and access to yard privileges and hobby crafts."

The trial court held that the plaintiffs bore the burden of showing that intentional discrimination motivated the differences in programs and services. The plaintiffs argued the government must demonstrate that the differences in prison services and programs were substantially related to an important governmental interest. The supreme court has held that when regulations restricting prisoners' constitutional rights are challenged, the appropriate standard of review is whether the regulation is rationally related to a legitimate penological purpose. See: *Turney v. Safley*, 482 US 78, 107 S.Ct. 2254 (1987). This results in a very low level of judicial review where courts will uphold those prison regulations that violate prisoners' rights as long as they are somehow related to asserted prison interests.

"Not all reviews of prison policies or practices require judicial deference, however. The District of Columbia Circuit held in *Pitts v. Thornburgh*, 866 F.2d 1450 (1989), that the District of Columbia's policy of housing women inmates in a distant facility and men inmates in a near-by institution because the practice involved 'general budgetary and policy practices.' *Pitts* applied traditional heightened scrutiny and required a showing by the government that the policy was substantially related to an important governmental interest. *Turner* does not foreclose all heightened judicial review." In its remand order the appeals court stated it would be up to the trial court to apply the correct standard of review to the facts which it finds.. See: *Pargo v. Elliot*, 49 F.3d 1355 (8th Cir. 1995). ■

Detainees Entitled to Hygiene Items

A district court in Illinois has held that pretrial detainees are entitled to clean linen and clothes on a regular basis as well as adequate ventilation, medical treatment and food. The court begins its ruling with a quote by Dr. Karl Menninger who described American jails, including the Cook County (Chicago) jail where this suit arose, as "miserable, overcrowded, crime and disease breeding." That was in 1966, despite numerous suits, the passage of time and increased jail size the problems affecting the Cook county jail have actually worsened. Due to a consent decree Cook county jail detainees can only bring suit for money damages, claims for equitable relief must be brought as contempt actions in the consent suit.

Fred Wilson was a detainee in the jail for a two year period. He filed suit against the Cook County Board of Commissioners alleging numerous violations of his federal rights, including insufficient toilets, showers and sinks due to overcrowding in the jail, denial of clean sheets, soap, toilet paper, uniforms and underwear. He also stated he tested positive for tuberculosis but was given no treatment. The jail is a closed environment with no open windows and an inadequate ventilation system where he was continuously exposed to environmental tobacco smoke. Despite a back problem he was forced to sleep on the floor.

The defendants filed a motion to dismiss the suit for failure to state a claim upon which relief could be granted pursuant to Fed.R.Civ.P. 12(b)(6). The district court denied the motion in part and granted it in part. The court dismissed several of Wilson's claims because he did not allege any actual injury from the condition complained of, i.e. overcrowding, sleeping on the floor of the jail, inadequate staffing and lack of outdoor exercise.

Discussing the standard of review, the court notes that pretrial detainees may not be punished at all. Detainees' rights are analyzed under the fourteenth amendment's due process clause and not the eighth amendment. See: *Bell v. Wolfish*, 441 US 520, 99 S.Ct. 1861 (1979). The court expressed doubts about the seventh circuit ruling in *Salazar v. City of Chicago*,

940 F.2d 233 (7th Cir. 1991) which largely adopts the eighth amendment analysis of *Wilson v. Seiter*, 501 US 294, 111 S.Ct. 2321 (1991) and applied it to fourteenth amendment claims by detainees. While *Salazar* requires a subjective intent on the part of jail officials to violate detainees rights (i.e. they must be aware of the violation) the objective component differs in that "the standard under the Fourteenth Amendment remains whether the pretrial detainee has been punished at all, not whether such punishment is so 'extreme' as to amount to cruel and unusual." See: *Miller v. Fairman*, 872 F. Supp. 498 (ND IL 1994).

Applying these standards the court held that Wilson had stated a claim with regards to being denied clean bedding and clothes because it could infer that the intent of such restrictive practices was to punish the detainees. The court noted that similar practices had been held to violate the eighth amendment. "If such conditions can violate the Eighth Amendment's prohibitions against cruel and unusual punishment, they necessarily would also violate the Fourteenth Amendment's prohibition against any punishment at all." Because Wilson alleged the defendants were aware of the conditions he met the subjective component of the *Wilson* test.

The inadequate ventilation claims also withstand the motion for dismissal because adequate ventilation is a fundamental attribute of shelter that prison and jail officials must provide under the eighth amendment. Likewise, detainees have a right to have their medical problems treated; Wilson claimed that food in the jail is often cold, spoiled and served on roach infested, dirty food trays. The court held that the allegation that jail officials have failed to provide nutritionally adequate food under conditions that present an immediate danger to the health of the detainees who eat it would violate the eighth amendment and thus the fourteenth amendment as well. See: *Wilson v. Cook County Board of Commissioners*, 878 F. Supp. 1163 (ND ILL 1995). Another ruling also dealing with conditions of confinement at the Cook County jail is *Landfair v. Sheahan*, 878 F. Supp. 1106 (ND Ill 1995). ■

News in Brief

PA: On August 2, 1995, SCI Graterford prison guards Keith Robertson and Martin Williams were arrested for drug possession with intent to deliver. Both guards were seen, during an investigation, dumping drugs behind vending machines and trash bins within the prison.

FL: Israel Martinez was charged with breaking into the Glades Correctional Institution while intoxicated. He was arrested and charged.

OH: In August, 1995, the Hamilton County (Cincinnati) sheriff released 49 prisoners serving sentences for nonviolent offenses early in an effort to ease overcrowding at the jail. The jail was over its 1,240 capacity by 17 prisoners. The releases were made to make room for weekend arrests.

WA: On August 11, 1995, the Department of Justice announced it had awarded the DOC a \$1.8 million grant to fund a 200 bed "work ethic" camp on McNeil Island. The camp is expected to take 2 years to finish. The grant will allow construction of separate facilities in which to house the work ethic prisoners. The grant requires the state to match the grant with 25% of funds.

Russia: On September 2, 1995, two prisoners suffocated and a third was hospitalized in critical condition at the pre trial detention facility in Perm, a Ural Mountains city 700 miles east of Moscow. Three other prisoners had to be revived with respirators the night before. The warden ordered windows and food hatches opened at the prison, which holds twice as many prisoners as it was designed for.

Denmark: On August 27, 1995, 12 prisoners escaped from the Vridsloeselille prison in a Copenhagen suburb after a bulldozer broke a large hole in the prison's 26 foot wall. The prison escape was timed to coincide with a soccer game at a nearby stadium. The escape was filmed by a local TV station and shown on the news. Several days later one of the prisoners returned to the prison and surrendered.

OK: On August 19, 1995, Robert Brecheen was found in his McAlester

death row cell, groggy from a drug overdose. Prison guards administered first aid and rushed him to a local hospital where his stomach was pumped and he was successfully revived, at a cost of \$5,000. Brecheen was then returned to McAlester where he was strapped into a gurney and administered a drug overdose by prison guards, killing him. Larry Fields, director of the Oklahoma DOC, said "Certainly there's irony, but we're bound by the law..." Newspaper accounts described Brecheen as "a favorite among guards because of his cooperative nature. Some corrections officers testified on his behalf on his behalf at his clemency hearing, describing how he makes their jobs easier."

VA: On September 5, 1995, Allen Wilhelm was found languishing in the Spotsylvania courthouse, where he had been imprisoned on a traffic offense for five days without food. His cell had running water and a toilet but no bedding. Wilhelm had been ordered to spend two days in jail but a bailiff forgot to transfer him to a regional jail. The bailiff was fired and Wilhelm suffered no visible lasting ill effects.

NY: On September 13, 1995, former Rockland County district attorney Kenneth Gribetz was sentenced to five years probation, fined \$10,000 and ordered to perform 500 hours of community service after being convicted in federal court of tax evasion and misusing county funds. Gribetz received some \$36,000 in kickbacks from law firms

for steering civil cases their way and misused \$23,000 in county funds for personal matters including trysts with his lover. Much media attention was focused on Gribetz's penchant for cross dressing. Federal investigators said they removed sex toys, whips, a gold lame mini-skirt, black high heels, pantyhose and a wig from Gribetz's home. ■

TX Abolishes Furloughs

The Texas Department of Criminal Justice (TDCJ) administratively abolished furloughs for prisoners on July 1, 1995. In doing so it acted three months before a recently enacted state law eliminated all the furloughs, effective September 1, 1995. Under the state law only emergency furloughs are allowed.

The furloughs being abolished were known as "appropriate reason" leaves and included allowing prisoners out for seven days for non-emergency reasons. TDCJ officials had 4,319 leave requests in 1994 and granted 1,613 of them. Of the furloughs granted only 30 violated the furlough terms. Emergency furloughs, such as the death of a family member, will still be allowed but the prisoner must remain under guard at all times. ■

Source: *Corrections Today*, July, 1995.

Chomsky Tape Available

Noam Chomsky is America's foremost dissident intellectual. He gives excellent, piercing analysis of American foreign and domestic policy and whose interests it serves. We have frequently recommended his books. Now, for a limited time PLN has a one hour radio-version, on tape, of the movie *Manufacturing Consent: Noam Chomsky and the Media*. Puzzled about media coverage on crime and its bias? Chomsky spells it out in the foreign policy context.

These are factory tapes made out of transparent plastic, they are not factory sealed. These were donated to PLN for use as a fund-raiser. To order tapes please send \$10, per tape including shipping, to PLN and specify that you want the tape. This is a great buy with the money going to a worthy cause.

Prisoners Entitled to Safe Jail

The eleventh circuit court of appeals has reaffirmed that county officials can be held liable for failing to protect jail detainees from violence by other detainees. In 1990 Larry Hale was held in the Tallapoosa County Jail in Alabama after failing to appear in court on a marijuana charge. The county jail had been extremely overcrowded for at least two years prior to Hale's arrival. During times of overcrowding violence at the jail escalated. While he was placed in a large communal cell, two prisoners, including one held on murder charges, attacked Hale and severely beat him. Hale screamed for help but no jail guards came to his assistance. Hale remained in the cell with his attackers for several hours until a new shift of guards came on duty.

Hale filed suit against the guard on duty at the time and sheriff Smith claiming that they had shown deliberate indifference to his right to remain free from attack by other prisoners. The district court granted summary judgment in favor of the defendants holding that Hale had not presented sufficient evidence to support his claim. The court of appeals for the eleventh circuit affirmed in part, reversed in part and remanded for trial.

Both prisoners and jail detainees can file suit when prison officials' deliberate indifference to a substantial risk of serious harm results in injury. See: *Farmer v. Brennan*, 114 S.Ct. 1970 (1994) *PLN*, Vol. 5, No. 7. To survive summary judgment on his eighth amendment claim Hale "was required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendant's deliberate indifference to that risk; and (3) causation. *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993)."

The court held that the jail guard was entitled to dismissal of the suit against him because there was insufficient evidence against him. Hale's claim against the jailer was that instead of making his rounds every 30 minutes the jailer did not make any rounds for two and a half hours on the night of the attack on Hale.

Discussing the burden of proof that Hale bore in withstanding summary judgment, the court noted that Hale first "was required to produce evidence that he was 'incarcerated under conditions posing a substantial risk of serious harm.'" Hale produced evidence that prisoner on prisoner violence occurred regularly when the jail was overcrowded, as it was during Hale's stay there. Hale produced evidence showing that the violence was severe enough on occasion to require medical treatment and hospitalization of detainees. "A jury viewing this evidence and all reasonable inferences therefrom in the light most favorable to Hale reasonably could find that a substantial risk of serious harm existed at the jail. Hale thus met his burden on this element."

Hale was also required to produce evidence that the sheriff and county were deliberately indifferent to that risk. "More specifically, Hale was required to show both that Smith subjectively knew of the substantial risk of serious harm and that he knowingly and recklessly 'disregarded that risk by failing to take reasonable measures to abate it.'" Assessing the evidence presented, the court held that Hale had presented sufficient evidence on this issue as well.

Hale presented depositions and testimony from the sheriff indicating that he subjectively knew a substantial risk of serious harm existed at the jail. The sheriff testified that he was aware that prisoner on prisoner violence was occurring on a regular basis at the jail during periods of overcrowding. He was aware that the violence sometimes resulted in injuries requiring hospitalization. Hale's expert witness testified that given the conditions existent in the jail "it was plainly foreseeable to a reasonable law enforcement official that a violent attack was likely to occur."

That Hale had not notified any jail guards of his fear of attack from any specific prisoner was immaterial. In *Farmer* the supreme court held that although relevant, a plaintiff's failure to give advance notice of an attack is not dispositive. "Thus, an official may

not escape liability merely by showing that he did not know the claimant was likely to be assaulted or that an assault would be committed by the specific prisoner who eventually committed the assault... Hale was not required to show that Smith knew 'precisely who would attack whom,' but only that Smith had subjective knowledge of a generalized, substantial risk of serious harm from inmate violence." The court held that Hale had presented sufficient evidence to allow a jury to find in his favor on this claim.

Noting that mere knowledge of a substantial risk of serious harm, alone, is not sufficient to show deliberate indifference, the court stated that Hale was also required to produce evidence that, "with knowledge of the substantial risk of serious harm, Smith knowingly or recklessly 'disregarded that risk by failing to take reasonable measures to abate it.'" "Thus, under this standard, a jury could reasonably find that Smith 'failed to take reasonable measures to abate' a known risk of harm if the evidence showed that he knew of ways to reduce the harm but knowingly declined to act, or that he knew of ways to reduce the harm but recklessly declined to act." Hale produced sufficient evidence to meet this element of proof by showing that the jail had no policy of classifying or segregating prisoners by offense; prisoners were not assigned specific cells and bunks; the jail had no written training policy and jail guards received no professional training at all; and the jailers were stationed out of earshot and eyesight of the holding cell area.

The court held that Hale had presented sufficient evidence to prevail on the third element he needed to meet, that of causation between sheriff Smith's deliberate indifference and the beating he suffered. The court held that a reasonable jury could find that Hale's injuries stemmed from overcrowding and conditions at the jail as he described. This case will be of special interest to anyone litigating a failure to protect claim in the eleventh circuit. It is also among the first circuit cases to apply *Farmer*. See: *Hale v. Tallapoosa County*, 50 F.3d 1579 (11th Cir. 1995). ■

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10th Circuit Vacates Utah Court Access Order

In the November, 1994, issue of *PLN* we reported *Carper v. Deland*, 851 F. Supp. 1506 (D UT 1994) which involved a class action suit filed by Utah state prisoners claiming that the DOC's method of providing court access, contract attorneys with no law library access, was constitutionally deficient. The district court upheld the provision of contract lawyers, with no law library access, and entered an extensive injunction ordering the state DOC to pay lawyers to handle a variety of civil legal matters for prisoners, in addition to habeas corpus and civil rights actions. The court of appeals for

the tenth circuit, in a ruling that is out of synch with other circuits, vacated and remanded the case.

Prior to 1990 the Utah DOC (UDC) provided contract lawyers to assist prisoners in habeas corpus, civil rights and general civil matters, such as wills, divorces, workers compensation, etc. In 1990 the DOC promulgated a new legal services policy whereby the DOC hired two private attorneys to assist prisoners in preparing and filing state or federal petitions for habeas corpus and initial pleadings (i.e. complaint, in forma pauperis petition, summons, etc.) in civil rights actions challenging conditions of confinement in the UDC or a county jail. In contrast to prior contracts, this one made no provision to provide prisoners with assistance in general civil matters and the contract did not provide for any attorney assistance beyond the initial pleading stage.

Both parties moved for summary judgment, with the UDC arguing that their plan satisfied their legal obligation to provide prisoners with access to the courts. The prisoners argued that the plan violated their right of court access by essentially not allowing them to present any other type of claims to the courts, such as divorces, worker's compensation claims, etc., the district court ruled largely in favor of the plaintiffs, rejecting their claim that they were entitled to assistance in some matters such as name changes, writs of certiorari to the US supreme court, personal injury, etc., and entered an injunction requiring the UDC to provide prisoners with legal assistance in general civil matters.

The appeals court noted that prisoners have a right of access to the courts and states have an affirmative obligation to assure such access, by providing either adequate law libraries or adequate assistance from persons trained in the law. States may chose either, or a combination, of those methods to satisfy their obligation. "A state may elect to provide legal assistance to inmates in lieu of maintaining an adequate prison law library.... Legal assistance, however, does not necessarily entail assistance from a lawyer..." but can be met by supplying assistance from "persons trained in the law" such as prisoner law clerks, paralegals, law students, volunteer attorneys or staff attorneys.

The court cites a long list of tenth circuit precedent to the effect that states must provide legal assistance only in the preparation and filing stage of their petitions to the court. In other words, a state can get away with not providing any type of a law library, just someone "trained in the law" to draft a habeas or civil rights petition on a prisoner's behalf and get it filed in court, whereupon the prisoner is left with no assistance from a "person trained in the law" and without law library access to prosecute the case on their own. "Other than habeas corpus or civil rights actions regarding current confinement, a state has no affirmative constitutional obligation to assist inmates in general civil matters." The court qualified this general rule by stating: "Although a state has no affirmative duty to assist an inmate in other civil matters, the state may not erect barriers that impede the right of access

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of incarcerated persons.” But the court leaves it unclear how not providing a law library or counsel to prisoner litigants does not constitute a “barrier erected by the state.”

The appeals court vacated the lower court’s ruling in favor of the prisoners and remanded it to the lower court with instructions to enter summary judgment in favor of the prison official defendants. Readers will note that the US Supreme Court has granted certiorari and will hear *Casey v. Lewis*, *PLN*, Vol. 6, No. 6, concerning prisoners’ right of access to the courts. It remains to be seen how that case will be decided. This ruling is at variance with other court rulings concerning prisoners’ right of access to the courts, which have held prisoners should be permitted to defend themselves against civil suits, forfeiture actions, etc. See: *Carper v. Deland*, 54 F.3d 613 (10th Cir. 1995). ■

From the Editor by Dan Pens

Welcome to another edition of *PLN*. We have published continuously for five and a half years now. A lot of people write and ask the same question, “Gee, how did you guys do it?” The answer is simple, hard work and persistence. It’s pretty much the same tried and true formula for success that has been utilized by countless people in a wide range of human endeavors. Of course, no matter how much dedication or hard work the *PLN* collective is able or willing to contribute, we also could not have succeeded without the financial support of you, our readers.

Next month we will publish our first “Annual Index” issue. We’re pretty excited about the index. It enhances *PLN*’s usefulness as a serious legal research tool.

We have a large backlog of legal articles to get into print, many of which appear in this issue. So... moving right along, I hope you enjoy this issue of *PLN*. Pass it along to another when you’re done. And please send in a donation of stamps or money. We literally couldn’t publish without your continued financial support. ■

Denial of Toilet Unconstitutional

A district court in Texas has held that placing a jail detainee in a cell with an inoperable sink and toilet and barely functioning shower and denial of hygiene materials violates the eighth amendment. Isiah Sanford was a detainee in the Ector County Jail in Texas when he was placed in segregation. The cell he was placed in had a non-flushing toilet encrusted with scum, an inoperable sink and a filthy shower stall with an excrement smeared shower curtain. Only a small stream of cold water emerged from the shower. Sanford informed jail guards of the cell’s situation and was told no other cells were available. Sanford told jail guards he needed to use the toilet and was again refused access to a toilet or toilet paper. He was forced to defecate in the shower and had to tear his tee shirt to pieces in order to clean himself. Sanford remained in the cell for six days and was denied clean-

ing supplies and toilet paper during that period.

Sanford filed suit claiming that the conditions of the cell violated his eighth amendment rights. The court cited numerous cases, many going back to the 1960’s which hold that denying prisoners basic hygiene materials and access to functioning toilets violate the eighth amendment. The court held that Sanford’s six day ordeal was a “serious deprivation of serious human needs” in violation of the eighth amendment.

The court held that jail officials were deliberately indifferent to Sanford’s “requests for a minimal amount of relief from his squalor....” However, the court held that Sanford did not show any damages resulting from his ordeal and awarded nominal damages in the amount of one dollar from two defendants. See: *Sanford v. Brookshire*, 879 F. Supp. 691 (WD TX-1994). ■

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We solicit well written articles about prison legal issues, prison struggle, legislation that impacts prisoners and news about prison issues that may be of interest to a national readership. We are particularly interested in well researched legal analysis of specific prison rights issues. An article that provides a broad overview of case law on one specific issue, with case citations included, is especially helpful to our many readers who have little or no access to law libraries.

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Opening Legal Mail Violates Access to Courts

The court of appeals for the third circuit has held that opening a prisoner's legal mail outside his presence violates his right of access to the courts. The court also held that this right is well established so that prison officials who violate it are not entitled to qualified immunity for doing so. The appeals court gives an extensive review of the case law from all circuits concerning prisoners' right to receive uncensored mail from courts and attorneys. Anyone litigating this issue will find this case extremely helpful as law review articles and legal treatises on prisoners' rights are among the sources cited. Polyns Bieregu is a federal prisoner who received mail from federal courts on five occasions where it had been opened outside his presence. He filed a *Bivens* suit claiming that the censorship violated his constitutional rights. The district court held that the openings were unconstitutional but that the defendants were entitled to qualified immunity because the right was not clearly established in the third circuit. The court of appeals for the third circuit affirmed in part, reversed and remanded in part.

The court notes that there is some disagreement amongst the circuits as to what right is violated when legal mail is opened outside prisoners' presence (some circuits hold it is a right under the first amendment's free speech and right to petition the government clauses, others rely on the due process clause, others on the sixth amendment's right to counsel and one has found it in the right to privacy). The court concluded that regardless of the source of this right, Bieregu had a clearly established right not to have his legal mail opened and read outside his presence. Thus, the defendants were not entitled to qualified immunity for their actions.

In its ruling the court analyzed all the above cases on prisoner legal mail and adopted portions of them to support its ruling. "... We need not determine the exact outer limits of a prisoner's right to free speech, for we are satisfied that a pattern and practice of opening properly marked incoming court mail outside an inmate's presence infringes communication protected by the right to free speech. Such a practice chills protected expres-

sion and may inhibit the inmate's ability to speak, protest, and complain openly, directly, and without reservation with the court." The court concluded that Bieregu had presented sufficient evidence that a trier of fact could conclude that "there exists a pattern and practice of opening plaintiff's incoming court mail outside his presence." The court did not decide whether the opening of the mail outside Bieregu's presence constituted censorship because he could only show one instance in which his mail was actually damaged as a result of the openings.

The court gave ample discussion to the right of access to the courts and its source. The court concluded that "the First Amendment right to petition, as currently interpreted, is a birthplace for the right of court access." The court held that the sixth amendment's guarantee of the right to counsel applies only in the criminal context and does not apply to civil or civil rights actions. Readers should note that in a different factual scenario the court might rule otherwise, i.e. the mail opened is from attorneys representing the prisoner in a criminal case, on appeal from a conviction or discussing matters related to a criminal conviction.

The court held that the right of court access emanates from the due process clause of the constitution. In this case Bieregu could not show that he had suffered any actual injury from the opening of his legal mail. This would normally be fatal to most civil rights claims, or at best entitle a plaintiff to only nominal damages. "... We conclude that repeated violations of the confidentiality of a prisoner's incoming court mail are more central than ancillary to the right of court access, and thus no showing of actual injury is necessary for plaintiff to establish that the right has been infringed. We are satisfied that a practice of opening court mail outside an inmate's presence implicates a core aspect of the right. Such conduct inhibits an inmate's ability to protect his legal rights in court and frustrates the principles of *Bounds*. Unlike free pens or slight delays in notarizing documents, interference with such mail threatens the primary, often sole means by which a prisoner can exercise his con-

stitutional rights. Without assurances that legal correspondence, including both attorney and court mail, is confidential and secure, court access can hardly be effective, adequate and meaningful."

The court limited its holding by noting that a single, isolated and inadvertent opening of legal mail would likely not meet this standard, and cites several circuit cases holding that two openings show a constitutional violation. "Determining whether a prisoner has demonstrated a custom or practice is a fact bound inquiry."

The court made several helpful clarifications to its ruling. "First, reading legal mail would appear to infringe the right of access even more than simply opening and inspecting it. Second, as the Supreme Court noted, the only way to ensure that mail is not read when opened, and thus to vindicate the right to access, is to require that it be done in the presence of the inmate to whom it is addressed.... Third, interference with attorney mail probably infringes the right of court access even more than interference with court mail, whether the correspondence relates to a criminal conviction, a subsequent collateral proceeding, or a civil suit to protect an inmate's constitutional rights. Of all communications, attorney mail is the most sacrosanct."

"We conclude that a pattern and practice of opening plaintiff's properly marked incoming court mail outside his presence impinges upon his constitutional rights to free speech and court access." This right doesn't depend on prison officials violating state statutes or administrative policies setting forth the confidentiality of legal mail because these do not create a constitutional violation.

The court held that the practice of opening plainly marked incoming court mail outside the prisoner's presence violates the constitution. The court analyzed the practice, which also conflicted with published BOP rules, under the *Turner v. Safley* "reasonableness standard." The court noted that the fifth circuit in *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), [PLN, April, 1994,] had upheld this practice but *Brewer* was at odds with every other court to consider this issue.

Legal Mail (cont.)

In seeking qualified immunity the government argued that "while the illegality of their behavior was manifest, the constitutional magnitude of their actions was murky." The district court accepted this argument but the appeal court rejected it. Noting that prisoners' right to confidential incoming legal mail was firmly set forth by the supreme court, by all the district courts in the third circuit to consider the issue as well as every circuit court to consider this, except for *Brewer*. The court thus reversed the lower court's qualified immunity ruling. See: *Bieregu v. Reno*, 59 F.3d 1445 (3rd Cir. 1995). ■

WI Court Upholds DOC Classification Policy

A Wisconsin state appeals court has upheld DOC rules which establish minimum periods that lifers are required to serve in maximum security prisons. The DOC rules assign each lifer to one of four security classifications, based on the prisoner's conviction, criminal history and sentence structure. The DOC's chief of classification has the discretion to place the prisoner in a medium security prison at an earlier date. On May 11, 1995, the 4th district court of appeals held that these rules do not violate the constitution's ban on ex post facto punishment. ■

The court noted that the rules only establish presumptive security classifications for the affected prisoners and allow exceptions for individual cases based on a discretionary early assignment process. The court held the rules were implemented to achieve legitimate penological goals and not with the aim to punish for past activity or to make punishment more burdensome.

The court quoted *State v. Thiel*, 524 N.W.2d 641, 645 (Wis Sup.Ct. 1994), that the rules were not "punishment even though [they] may bear harshly upon [the ones] affected." See: *State v. Burrus*, Wis Ct.App. Dist. IV, No. 94-1329, May 11, 1995. 57 CrL 1208, 5-31-95. ■

Detainee States Claim for Retaliation and Med Needs

The court of appeals for the seventh circuit has held that pre-trial detainees are entitled to adequate medical care and have a right to be free from retaliation for complaining of guard misconduct. Richard Murphy was a pre-trial detainee in the Tazwell and Mason county, Illinois, jails. He filed suit claiming that a guard closed a slot on his hand, breaking several bones. He was then denied appropriate medical care for the injury. After accusing the guard of breaking his hand, jail officials retaliated against him by shackling him to the floor of his cell and revoking his phone privileges. He also challenged his conditions of confinement at the jail. The district court dismissed the suit for failing to state a claim under Fed.R.Civ.P. 12 (b)(6).

The appeals court noted that it reviews all 12(b)(6) dismissals *de novo*, accepting as true all factual allegations in the complaint and drawing all reasonable inferences from these facts in favor of the plaintiff. The court upheld dismissal of the claim that Murphy waited two hours after his hand was broken before being taken to the hospital. The delay occurred because the sheriff's permission was necessary before he could be taken from the jail. The court noted that Murphy did not claim the injury required immediate attention nor that two hours was unreasonably long under the circumstances.

Murphy fared better with his retaliation and shackling claim. The court notes that pretrial detainees, who are not yet convicted of any crime, may not be punished. If Murphy was shackled to the floor of his cell, as he claimed, then he stated a claim. "Shackling one to the floor is an extreme measure, and several courts have stated that bodily restraints may not be used as punishment; they may only be used on violent inmates who pose a threat to others or suicidal inmates who pose a threat to themselves.... Even if shackling is permissible as punishment in limited circumstances, Murphy, as a pretrial detainee, possessed a liberty interest in freedom from bodily restraint, and he's entitled to recover for this infringement unless the government demonstrates a legitimate penological or medical reason for its use of shackles." ■

The court held that Murphy also stated a claim with regard to being denied phone access which impeded his ability to communicate with his attorney. "Restrictions on a detainee's telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. *Tucker v. Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991)." ■

Murphy claimed that he slipped and fell in a shower, suffering a head injury for which he was denied treatment for several months. The appeals court upheld dismissal of his claim that the shower was unsafe but reversed the claim concerning the delay in treatment. Pre-trial detainees must be provided with medical treatment if a reasonable guard would consider the injury serious. "Any injury to the head unless obviously superficial should ordinarily be considered serious and merits attention until properly diagnosed as to severity." Murphy claimed that when he sought medical care guards told him to "stop being a baby." The court held that any head injury resulting in pain "mandates medical evaluation within a reasonable period of time." ■

The court was quite troubled by the care Murphy alleged regarding the removal of his cast without medical supervision, not being provided with a follow up medical exam after the cast was removed and refusing to provide him with prescribed extra strength Tylenol. The court noted that a broken hand is a serious injury and permanent disability may result absent proper treatment. Thus, proper follow up care should have been provided. The lower court erred by dismissing this claim and not requiring the defendants to respond to it. Likewise the failure to provide the Tylenol. The conduct as a whole showed deliberate indifference to his serious medical needs and stated a cause of action.

Murphy claimed he was placed in a jail cell with no clothes, no mattress, pillows, blanket, or heat. These conditions lasted ten days. The court held this too stated a claim. While detainees have no right to comfortable confinement, they do retain a right to adequate heat and shelter. The court reversed and remanded the case for further proceedings. See: *Murphy v. Walker*, 51 F.3d 714 (7th Cir. 1995). ■

RFRA Analyzed and Applied in the 10th Circuit

The court of appeals for the tenth circuit has issued its first ruling analyzing the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, holding that it may well require prison officials to provide Native American prisoners with sweat lodge facilities. Robert Werner, a Utah state prisoner, filed suit under the RFRA and 42 U.S.C. § 1983 contending his religious beliefs were violated when prison officials denied him access to a sweat lodge, prohibited him from receiving a medicine bag, failed to provide him with access to a Cherokee Native American spiritual advisor and failed to obtain various religious symbols for him. The defendants moved for summary judgment and the district court dismissed the suit without reaching the legal or factual merits of Werner's claims. The court of appeals for the tenth circuit affirmed in part, reversed in part and remanded.

In passing the RFRA congress overturned the supreme court decisions in *Turner v. Safley*, 482 US 78, 107 S.Ct. 2254 (1987) as it applies to prisoners' religious claims and *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct. 2400 (1987). The RFRA provides substantially greater protection to prisoners' religious rights than the courts had under constitutional standards. The appeals court discussed the RFRA, its legislative history and its application to prisons. The court held that under the RFRA "...a prison system may not substantially burden a prisoner's right of free exercise in the absence of a compelling state interest and must employ the least restrictive means necessary to further that interest." While courts should give prison officials due deference on measures needed to maintain prison order and discipline, "the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the 'highest order.'"

"This is not to say that all regulation of religious activity or expression must be supported by a compelling state interest. Constraints upon religious conduct will not fall within the ambit of the Act unless a 'substantial burden' is placed upon a prisoner's capacity to exercise or express his or her sincerely held

beliefs or faith. To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs... must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.... Thus, reasonable time, place, or manner restrictions upon communal religious gatherings would often not necessitate the identification of compelling state interest; however, regulations that, for example, prevented a devout Muslim from observing daily prayers would be subject to the 'compelling interest' test."

The appeals court held that the record before it was insufficient for it to determine whether the denial of sweat lodge access served a "compelling state interest" and the magnitude of that interest, if any. The court noted that even under the restrictive *Turner* standard courts had recognized the important role sweat lodges play in Native American spiritual life and that the construction, maintenance and use of sweat lodges may not place an unreasonable burden on prison officials. The court held that Werner had set forth a prima facie case by submitting evidence that the sweat lodge plays an indispensable role in his sincerely held religious beliefs. This issue was remanded to the lower court for factual development and consideration under the "compelling interest" standard.

The appeals court also remanded the issue concerning the ban on medicine bags for maximum security prisoners. The court noted that while there may be a compelling state interest for banning medicine bags in parts of the prison, the defendants based their argument on the now abandoned *Turner* and *O'Lone* standard while the district court did not base its analysis on the RFRA. This issue was remanded to the lower court for further factual development.

The court upheld dismissal of Werner's claims concerning not being provided the spiritual advisor of his choice because prison officials had attempted to locate Native American spiritual advisors but they were not to Werner's liking. The court held that the de-

fendants were entitled to qualified immunity because their actions took place before passage of the RFRA and they could have reasonably believed their actions complied with *O'Lone*. The finding of qualified immunity does not moot Werner's claims for injunctive relief. See: *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). ■

Sending State Responsible for Legal Materials

The ninth circuit has agreed with other circuits, holding that when a state prisoner is transferred to another state, the sender is responsible for ensuring the prisoners' access to the courts. James Boyd is a Kansas state prisoner who was transferred to the Washington State Penitentiary. He filed suit against Washington prison officials claiming that the WSP law library had insufficient legal materials on Kansas state law. The district court dismissed the suit as frivolous and the ninth circuit affirmed.

The only question on appeal was whether Kansas (the sending state) or Washington (the receiving state) was responsible for providing Boyd with the legal materials he needed. This is an issue of first impression in the ninth circuit. The tenth and first circuits have previously held that the "sending state authorities maintain the responsibility of providing required state legal materials for their prisoners incarcerated in sister state facilities." *Clayton v. Tansy*, 26 F.3d 980, 982 (10th Cir. 1993), [PLN. Vol. 5, No. 11]; *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir. 1981).

"We agree with the Tenth Circuit, and hold that sending state authorities maintain responsibility for providing state legal materials to their prisoners incarcerated in out of state facilities." Because Kansas state prison officials could not be served by a district court in Washington, the district court properly dismissed the suit as frivolous. See: *Boyd v. Wood*, 52 F.3d 820 (9th Cir. 1995). Readers will note that federal courts in Washington, in an unpublished ruling, *Larue v. Gardner*, required Washington DOC officials to provide their out of state prisoners with a microfiche viewer and Washington state law on microfiche to ensure their right of access to the courts. ■

Reversal of Disciplinary Hearing Doesn't Moot Suit

The court of appeals for the eighth circuit has held that a state court reversal of a prison disciplinary hearing does not preclude the prisoner filing suit for money damages in federal court. The appeals court also criticized and reversed the lower court for dismissing a claim under Fed.R.Civ.P. 12(b)(6), for failing to state a claim upon which relief could be granted, prior to service on the defendants. Wa'il Muhannad is a Nebraska state prisoner who was found guilty at a disciplinary hearing for fighting. Muhannad claimed he was denied 24 hour notice and an opportunity to prepare a meaningful defense at two prison disciplinary hearings. He filed suit in federal court claiming these actions violated his right to due process of law.

Muhannad also filed suit in state court claiming that the second disciplin-

ary hearing relied on insufficient evidence to find him guilty. While the federal suit was stayed, the state court ruled in Muhannad's favor and reversed the disciplinary committee findings. The district court then dismissed this claim as frivolous under 28 U.S.C. § 1915(d) holding that the state court reversal cured any due process violation Muhannad had suffered. Muhannad claimed that because he had completed the segregation sanction imposed he was entitled to money damages. The court of appeals held that because it had not yet determined whether money damages are available to prisoners who serve a disciplinary sanction later found invalid, it was not clear that Muhannad's complaint was "frivolous." *Walker v. Bates*, 23 F.3d 652, 657-58 (2nd Cir. 1994) held that a successful administrative appeal did not bar a § 1983 claim where the plaintiff

served the punishment and was not given a rehearing. Thus, there was an arguable basis in law and fact for this claim rendering it non frivolous.

In *Carney v. Houston*, 33 F.3d 893, 895 (8th Cir. 1994) the court held that pre service dismissals under the district court's local rule 83.10(d) and 12(b)(6) did not conform with prior case law. In this case, the magistrate dismissed Muhannad's claim that he was denied an opportunity to contest the denial of his yard time. The lower court held it found it "inconceivable" that Muhannad would have been denied such an opportunity. The appeals court held Muhannad was entitled to service on the defendants so they could respond to the complaint on its merits rather than to have the issue dismissed on the basis of the magistrate's suppositions. See: *Muhannad v. Kinney*, 51 F.3d 762 (8th Cir. 1995). ■

Missouri Ad Seg Damages Award Upheld

The eighth circuit court of appeals has affirmed an award of money damages to Michael Weems, a Missouri state prisoner, who was denied a review hearing while in administrative segregation. The court reaffirmed that Missouri state prisoners have a due process liberty interest of remaining in population and upheld the jury instructions used.

The case arose when Weems requested and was given household cleanser to clean the sink and toilet in his cell. That same day a guard confiscated the cleanser and reported the discovery of an unidentified white powder. Five days later Weems was placed in administrative segregation (ad seg) pending identification of the white powder. An initial ad seg hearing confirmed Weems's status for the duration of the investigation. That same day the county crime lab reported that the powder contained nothing illegal. Weems was scheduled for another ad seg hearing on January 4, which was not held, and he remained in ad seg for almost two months after the exonerating report was issued. Weems filed suit claiming that

the denial of the thirty day review violated his right to due process. The case went to trial and a jury awarded Weems \$2,600 in actual damages and \$1,500 in punitive damages. The segregation unit supervisor appealed the verdict against her. The court of appeals for the eighth circuit affirmed the jury verdict and damages award in their entirety.

After trial only one defendant, Donna McCondichie the segregation unit supervisor, was found liable for the violation of Weems's due process rights. In her appeal she claimed that Weems had no liberty interest in a thirty day review. The Missouri state Supreme Court held that Mo.Rev.Stat. § 217.375.2 (1990) created a due process liberty interest that Missouri prisoners held in administrative segregation were entitled to periodic reviews as set forth in the statute. See: *State ex rel. Haley v. Groose*, 873 S.W.2d 221, 224 (MO 1994). The appeals court concluded that Weems had a due process liberty interest in the thirty day ad seg hearing he was scheduled to receive but which never took place.

The court upheld the liability of McCondichie by noting that as the unit supervisor she was responsible for the regular review of prisoners' ad seg status. Thus, there was sufficient evidence to send the case to the jury, especially given the fact that there was some dispute as to when McCondichie had notice of the lab report on the cleanser. The court also rejected her claim for qualified immunity. The court noted that several state and federal court decisions had held that Missouri state prisoners had a due process liberty interest in their ad seg hearings, thus the lower court correctly denied her qualified immunity for her actions.

The court affirmed the jury instructions used in this case which found McCondichie liable for her actions. The court also affirmed the punitive damages jury instruction which required that the jury find she was "reckless and callously indifferent" to Weems's due process rights. Such instructions had previously been upheld by the US supreme court. See: *Weems v. Delo*, 52 F.3d 175 (8th Cir. 1995). ■

Open Prison Barracks Unsafe

In the past fifteen years of massive prison expansion many prison systems have opted to build open dormitory type prison barracks because they are substantially cheaper to build than conventional cell blocks. There are inherent shortcomings in this type of prison design. The Connecticut DOC recently discovered it can't "lock down" dormitory prisons after massive riots and disturbances. On the other hand, such prison barracks are notoriously unsafe with weaker prisoners much more likely to be assaulted, raped or killed.

The state of Arkansas has long housed many of its prisoners in open barracks. This has been the subject of extensive litigation. In *Finney v. Mabry*, 546 F. Supp. 628 (ED ARK 1982) and 534 F. Supp. 1026 (ED ARK 1982) the court entered an extensive injunction designed to ensure prisoners were adequately protected from assault and attack in the prison barracks at the Cummins unit of the Arkansas DOC. Despite the injunction, prisoner safety left much to be desired.

Ernest Smith was housed in a barracks in the Cummins unit. After informing on another prisoner Smith was stabbed with a hobby knife and another prisoner was killed by the same attacker. Smith filed suit claiming that prison officials had violated his eighth amendment right to remain free from assault by other prisoners. He sought declaratory and injunctive relief in his complaint. The district court granted Smith extensive relief as well as denying the defendants qualified immunity and finding them liable for money damages arising from the attack on Smith.

In *Farmer v. Brennan*, 114 S. CT. 1970 (1994), [PLN. Vol. 5, No. 7], the supreme court restated the principle that prison officials have a constitutional duty to protect prisoners from attack or assault by other prisoners. The court also discussed the standards to be met when a prisoner seeks injunctive relief from a court on issues of safety in prison. This is one of the first published lower court rulings to establish that standard.

The court granted injunctive relief in this case by finding that the defendants were not in compliance with the injunction in *Mabry* and due to that liti-

gation and prisoner complaints of attacks they had actual knowledge of the dangers faced by prisoners in open barracks yet failed to take many steps that were obviously required to alleviate those dangers. The key element to making the barracks safer was adequate staffing which would station at least one guard in each 100 prisoner barracks. This was attested to by the Arkansas DOC's own expert witnesses, a Department of Justice investigation and other sources. The legislature had in fact appropriated funds for additional barracks staffing but the DOC spent it on other matters. The court held that this ongoing fact pattern entitled Smith to injunctive relief. It also noted that additional studies and information received since *Mabry* was first decided indicated that additional changes should have been made to ensure prisoners' safety.

The court gave an extensive, detailed factual history of the litigation over the years concerning the lack of safety in open prison barracks operated by the Arkansas DOC. The information will be useful to anyone litigating similar safety issues involving open prison barracks. Likewise, this ruling is useful as one of the first to establish a prisoner's right to injunctive relief under the new *Farmer* standard. On a political note, it is interesting that while Bill Clinton was governor of Arkansas the Department of Justice was investigating the conditions of confinement in the Cummins unit. The DOJ concluded staffing was inadequate and needed to be increased. The Clinton administration and the DOJ reached an agreement whereby the DOJ wouldn't file suit if 92 staff positions were added to the Cummins unit. In 1991 Clinton obtained funding for these positions but never filled them. The court noted that four years after agreeing to implement the required staffing increases the DOC had not done so.

The court held the defendants were not entitled to qualified immunity from damages because they were well aware of the risks faced by prisoners in the open barracks. The only issue left for trial was the amount of damages that Smith should receive. The court also found prison officials liable for having a hobby policy that allowed prisoners to keep razor

knives in the barracks for hobby purposes. Smith's assailant used such a knife to carve on Smith and kill the other prisoner. The court held this policy created an obvious and pervasive risk of serious harm which entitled Smith to relief. The court likened this policy to allowing prisoners to keep loaded guns in the barracks and having prison officials argue they were not liable because only a few other prisoners had been shot by such guns. See: *Smith v. Norris*, 877 F. Supp. 1296 (ED Ark 1995). ■

CA Guard Plants Ammo

California prison guard, Mark B. Hardisty, not satisfied with his share of gravy from the state trough, decided he'd get himself some extra overtime pay. "That is the allegation they've come up with," says Hardisty's lawyer, Mike Rains of the Department of Corrections' case against his client.

According to state investigators Hardisty smuggled six .22-caliber bullets into California State Prison-Solano and planted them in the prison yard. The bullets were later found, wrapped in cellophane, with a note addressed to the prisoners in Building 12 that said, "This is your share." As a result of the ammo discovery, the prison was locked down for ten days.

Prison officials contend that Hardisty wrote the note as well as another note he allegedly "discovered" while processing prisoners' mail that read, "Any officer that wants to make the biggest find of their life, look in and around the trash cans outside of the building."

Hardisty, a CA guard for about ten years, was fired on July 3, 1995. Criminal charges were filed against him. He faces up to four years if convicted.

Rains said he is trying to resolve the case against his client by working out a deal with Solano County prosecutors wherein Hardisty would agree not to try and regain his job in exchange for leniency. Despite the attempt to strike a deal, Rains said his 37 year old client maintains his innocence. The attorney said "correctional officers other than Mark Hardisty" may be responsible for the placement of the ammunition. ■

Source: *Sacramento Bee*, Aug. 24, 1995.

Job Discrimination States Claim

While prisoners have no right to a job or work assignment they may not be discriminated against on the basis of their race. Lawrence Quinn, a white Pennsylvania state prisoner, applied for the position of clerk in a prison shoe plant. The plant foreman told him he could not have the job because he was not black and shop workers wanted a black prisoner to get the job. A black prisoner was eventually hired for the job. Quinn filed suit claiming that the denial of the job on the basis of race violated his equal protection rights. He also claimed that after he filed a grievance concerning the discrimination he was retaliated against when factory officials stopped paying him additional wages for extra work that he performed.

The defendants moved for summary judgment and the district court granted their motion in part and denied it in part. The court granted judgment with regards to Quinn's due process claims because prisoners have no liberty or property interest in any prison work assignment. Judgment was denied regarding the discrimination claim. "Although the plaintiff has no right to any particular prison job, prison officials cannot discriminate against him on the basis of his race in work assignments. See, e.g., *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987); *Bentley v. Beck*, 625 F.2d 70, 70-71 (5th Cir. 1980)." The court held there were genuine issues of material fact as to whether Quinn was discriminated against because of his race or some other reason.

The court also denied the defendant's motion with regards to the retaliation claim. Prisoners retain a first amendment right to petition the government for redress of grievances. There was a genuine issue of material fact as to whether the defendants "abandoned the practice of giving inmates 'extra hours' for 'extra work' across the board, or whether they singled out the plaintiff in retaliation for filing his grievance." The court held the defendants would not be entitled to qualified immunity for their actions because no reasonable prison official would believe that prisoners could be discriminated against on the basis of their race or retaliated against for filing grievances. See: *Quinn v. Cunningham*, 879 F. Supp. 25 (ED PA 1995). ■

Iowa Crime Legislation by Michael Brant

The 1995 Iowa legislature passed a new wave of bills that affect many Iowa prisoners and ex-prisoners. Among these new laws are: The refusal of the county treasurer to renew vehicle registrations if the person has unpaid delinquent restitution; the inmate hard labor law [Iowa Code § 904.701] which provides for the implementation of chain gangs and other "hard labor"; the entry of a civil judgement by the court against an offender upon the discharge of his/her sentence or probation for the balance, if any, of any restitution still owed to the victim of the crime [§ 910.5(1)(2)]; a charge of contempt of court against an offender after the discharge of his/her sentence or probation for the failure of the offender to continue to comply with the plan of restitution payments ordered by the court [§ 910.4]; limiting the opportunity for lifers to apply for sentence commutation to only one application every ten years, rather than applying at any time [§ 902.2].

One new law which may have the biggest impact on prisoners, limiting their access to the courts, is the law pertaining to litigation filed by prisoners [Sections 610A.1, 610A.3, 610A.4, 903A.3(1), and 904.702] which provides: requiring the prisoner to pay in full all costs associated with a civil action or appeal; requiring the prisoner to pay a minimum of 20% of the required fee before the court will address the action or appeal; requiring the prisoner to make monthly payments of 10% of all outstanding fees and costs associated with the action or appeal; requiring the DOC to withdraw from a prisoner's account money for the payment of fees and costs associated with the action or appeal until the fees and costs are paid in full; allowing the court to dismiss any civil action or appeal in which the prisoner has previously failed to pay fees and costs; allowing the forfeiture of some or all of a prisoner's good conduct time credits accrued if the court believes the action or appeal to be malicious or filed to harass or if he/she testifies falsely or presents false information or evidence to the court in the action -- it even allows the credits to be deducted by a prison disciplinary hearing; and, allowing the state to recover the cost of the incarceration of a prisoner from any claim made by or monetary obligation owed to the prisoner.

This law does, however, allow the court to make the authorization to proceed in forma pauperis if the court finds that the prisoner does not have the money in his/her account or enough money going into his/her account to make the required payments.

Full implementation of the "hard labor" law is to be accomplished by July 1, 1997. It is not known where or how Iowa will come up with the funds to implement the new hard labor law. The state will have to purchase the chains for chain gangs. New guards will have to be hired and trained. These obstacles, plus more, will put pressure on a prison system that is already short on staff and terribly overcrowded. Iowa's prison system is designed for 3,603 prisoners. It now holds more than 5,700.

Regarding the law providing that lifers can apply for a commutation of sentence only once every ten years - what is the reasoning in that? Under Iowa's present governor, Terry Branstad, there have been only two sentences commuted in over 12 years as governor. Why so little?

Iowa's governors in the last 40 years have commuted 153 life sentences (excluding Branstad, 1983 - present). From 1955-57, Leo Hoegh commuted 30 life sentences; 1957-61, Herschel Loveless commuted 46; 1961-63, Norm Erbe commuted 11; 1963-69, Harold Hughs commuted 39; and from 1969-83 Robert Ray commuted 27 life sentences.

Is this new law on commutations just so governor Branstad doesn't have to bother with considering commutations very often, since he is apparently opposed to them? Approximately every 13 days a new lifer enters Iowa's prison system, a system with already over 440 lifers. There are some who deserve a commutation of sentence. Will they ever see one?

[Editor's Note: Thanks to Michael Brant for submitting a clear, concise reporting on anti-prisoner/litigation laws in his state. A number of other states have passed or are contemplating similar laws (See: WA Passes Record Anti-Prisoner/Defendant Legislation, *PLN*, Aug. '95). We would like to report on similar legislative actions in other states. We depend on you, our readers, to keep us posted. If your state legisla-

Iowa Legislation (cont.)

ture has passed similar legislation, please submit a short summary article such as the one above. Try to keep it on point, focus on the facts and keep the opinion/commentary/rhetoric to a minimum.]■

Guard and Prisoner Get Damages in Beating Trial

A federal district court in New York entered a jury verdict in favor of a state prisoner who was beaten by prison guards, the court also ruled in favor of one of the guards who sued the prisoner out of events arising from the same incident. The ruling in this case was lengthy, dealing mainly with post-trial motions and evidentiary issues. In an appendix to the ruling it includes a sample of the jury instructions which would be helpful to anyone taking a similar case to trial.

Christopher Hyenas, a New York state prisoner, filed suit over two incidents involving excessive force at two different prisons. In short, Hyenas was severely beaten by guards at prisons in Southport and Green Haven. Hyenas suffered a black eye, swelling, cuts and numerous bruises and lacerations during the incidents. One of the guards, John Zemken, was kicked in the testicles during the Green Haven assault. Hyenas Filed suit and the case went to trial where a jury awarded Hyenas \$1,250 in damages from the Southport beating and \$1,500 for the Green Haven beating. The defendants objected, claiming the award was too high, Hyenas objected claiming it was too low. The court affirmed the verdict. The court lists numerous cases concerning damage awards in prison beating cases.

What is of interest is that Zemken counter-sued Hyenas for battery and the jury found in his favor, awarding him \$1,500 in damages for "excruciating pain, lost days of work, embarrassment, and the restraint on his relationship with his wife." The court discussed numerous evidentiary issues as to whether Hyena's disciplinary record should be admitted, closing arguments, etc. See: *Hyenas v. LaBoy*, 887 F. Supp. 618 (SD NY 1995). ■

Withholding of Legal Papers Illegal

A federal district court in New York has held prison guards liable for withholding a prisoner's legal papers for more than two years. The court awarded the plaintiff one dollar in nominal damages and \$500 in punitive damages to deter further conduct by prison guards. Donald Frazier, a New York state prisoner at the Collins Correctional Facility, was employed as prison law clerk when he was placed in segregation. While in segregation prison guards packed his legal materials and a guard confiscated some of Frazier's legal papers. Frazier asked for the papers while in segregation but when other guards tried to locate them they were unable to find them. Eventually this confiscation turned into a two year delay. Frazier filed suit and the case went to trial.

During the proceedings Frazier was released from prison and his attorney could not locate him to appear at the trial. His attorney sought to enter Frazier's deposition into evidence in lieu of his actual appearance, the court ruled that the deposition could not be entered because there was no evidence that Frazier was more than 100 miles from the court, simply put, no one knew where Frazier was. The court cites several cases where depositions were entered into evidence but distinguished those as cases where the moving party had offered proof they were more than 100 miles away. The trial proceeded without Frazier or his testimony.

In its factual findings the court held that the guards who seized the papers were aware that Frazier was in the process of filing suit against them when they seized his legal papers with the litigation drafts. The court noted the papers were readily available because they were promptly produced during discovery in the suit.

"The evidence is sufficient to find that Williams knowingly withheld the envelope from Frazier in violation of his constitutional right of access to the courts." The court held that the circumstantial evidence showed that the defendants were aware of the legal nature of the papers seized and after examining them simply refused to deliver them to Frazier.

The defendants argued that they could not be found liable because Frazier had failed to show actual prejudice from the seizure of his papers, and cited

Rodriguez v. Coughlin, 795 F. Supp. 609 (WD NY 1992); *Pickett v. Schaefer*, 503 F. Supp. 27 (SD NY 1980) and *Cookish v. Cunningham*, 787 F.2d 1 (1st Cir. 1986) to support their argument. "These cases are distinguishable, in that none dealt with a deprivation of materials which lasted longer than two weeks; whereas in our case, legal papers were withheld for a two year period. In *Morrello v. James*, 810 F.2d 344 (2nd Cir. 1987), the plaintiff was entitled to go forward with his action even though the materials were only withheld for six days. Moreover, defendants interpret 'actual prejudice' too narrowly. In *Rodriguez*, this court stated that 'defendants might be held liable under 42 U.S.C. § 1983 if the confiscation of plaintiff's legal material was in retaliation for the exercise of his constitutional rights, or he was actually deprived of access to the courts.' The court noted that had the defendants in this case withheld the papers for a short period of time and returned them to Frazier they would not have been found liable.

Turning to the question of damages, the court awarded Frazier nominal damages of one dollar because he did not suffer any actual damages and was able to pursue his legal actions. The award of damages was appropriate because one of the defendants intentionally withheld "the legal papers at issue in the violation of plaintiff's right to access to the court." The court awarded Frazier \$500 in punitive damages because he had proven there was an "intentional and continuing violation of a substantive constitutional right." Even if the defendant's conduct wasn't motivated by evil intent or malice the fact that he acted deliberately over a two year period to deny Frazier access to the courts justified the award. "In awarding punitive damages, the court has considered what amount would be sufficient to make clear to correctional officers that they may not participate in conduct similar to that set forth in this case. I believe that an award of \$500 will be sufficient to give notice to correctional officers that they cannot intentionally withhold legal materials from inmates." The court also awarded attorney fees. See: *Frazier v. Forgione*, 881 F. Supp. 879 (WD NY 1995). ■

Washington Translation Suit Settled

by Paul Wright

On January 23, 1995, Judge William Dwyer, US District Court in Seattle, accepted a stipulated motion in *Lopez v. Riveland*, Case No. C93-1030WD, a wide ranging lawsuit which challenged the almost complete lack of translation facilities for non-English speaking prisoners in the Washington DOC. This is one of the first lawsuits of its type and like a lot of novel litigation it had a rather long history.

Since 1988 or so I have assisted primarily Hispanic non-English speaking prisoners with their problems relating to inadequate medical care, disciplinary hearings, racism, etc., within the Washington DOC. The problems were readily apparent: policies and disciplinary reports, forms, memos, etc., were not available in Spanish; qualified interpreters were hardly ever provided for medical appointments, hearings, etc.; court access was non-existent; and more. Over the years I assisted prisoners in filing grievances and similar administrative complaints. In 1990 the DOC enacted DOP Policy 430.050 ordering prison wardens to publish prison rules, policies, etc., in Spanish when they were published only in English. This was never complied with or followed by the DOC. Grievances seeking compliance with the policy were met with evasive responses.

The widespread nature of the problems facing Hispanic prisoners was readily apparent. The DOC also realized it had a problem. In June, 1993, William Mendoza, a DOC employee, completed a report titled *Spanish Speaking Inmate Project* for the DOC. The study was in response to an increase in the level of incidents involving Hispanic prisoners. Among the problems identified by the DOC were the lack of qualified medical interpreters; rules and policies not translated into Spanish; no audio-visual aids for illiterate Hispanic prisoners, and the few policies that had been translated into Spanish were so riddled with errors they would actually mislead the prisoners.

The report concluded that the DOC had a liability problem with its lack of accommodation for Hispanic prisoners, who constitute some 15% of the Washington DOC's population. It noted

Hispanic prisoners tended to be employed in laundry, janitorial and kitchen jobs, i.e. those with the lowest pay, and which involved the handling of hazardous materials. No education or rehabilitative programs are offered in Spanish. Medical translation was virtually nonexistent and was a problem with regards to TB infected prisoners not understanding medication instructions.

It was interesting that Mendoza stated that racism was a problem that aggravated problems in the DOC. "Of more concern is the attitude of the staff towards inmates of color as well as the linguistic differences that are present. These attitudes may have contributed to the various disturbances and incidents that occurred and launched this project. There is a definite need to develop and facilitate cultural awareness. What was even more interesting were the comments of administrative and support staff who had little contact with the inmate population. Comments like 'I'm getting tired of dealing with these wetbacks' or 'I wish we had an institution full of blacks because they don't run, but they don't work either,' or 'If we provide for one group then we have to give the same to the blacks and Indians' were uncalled for and question the treatment of the inmates of color."

Deciding that this problem had gone on way too long Ed Mead, *PLN*'s former co-editor, and I drafted a suit on behalf of eight non English speaking Hispanic prisoners at the Washington State Reformatory, [see, *PLN*, April, 1994] and filed it in federal court. Despite having plaintiffs who spoke no English the court refused to appoint counsel. Letters to the Mexican American Legal Defense Fund and the Hispanic Bar Association seeking counsel went unanswered. Fortunately, John Midgley of Evergreen Legal Services agreed to take the case. The DOC soon entered into settlement negotiations after an amended complaint was filed which significantly expanded the original suit and added plaintiffs at other prisons.

The settlement agreement represents a significant advance for Hispanic prisoners in Washington state, if the DOC complies with it. It is important to note that the suit was not a class action and

this is not a consent decree. When Ed and I initially filed the suit we sought class certification. Because this has not been settled with a consent decree, class action status was not pursued as not to bind all prisoners with a difficult to enforcement settlement. The settlement is an agreement which can be enforced in state court as a contract which is less desirable than a consent decree, but no other prisoners are bound by the agreement and they can still sue for money damages should the DOC not comply. Likewise, the suit can and will be litigated if the plaintiffs don't agree that the DOC has met its obligations under the agreement. The suit is stayed for 18 months until a decision is made as to whether the agreement was complied with or not. Plaintiff's counsel will evaluate whether the DOC is complying with its obligations under the agreement this includes receiving copies of all written materials, interviewing DOC staff responsible for implementing the program and entering DOC facilities to review the provision of oral translation services.

Under the agreement the DOC agrees to provide within 18 months, (June 17, 1996), without charge, medical information dealing with sexually transmitted diseases, TB, hepatitis and other illness. Within 12 months, (January 17, 1996), the DOC must provide Spanish language versions of WAC policies on: Prison discipline, ad-seg/IMU, inmate personal property, inmate mail, medical care/health care, visitation and transfer of citizens of foreign countries. In the same 12 month period the DOC must translate policies on discipline; classification; grievance procedure; ad-seg; legal access; deportation proceedings; earned release time; clergy communication; religious freedom; prisoner searches; legal financial obligations; visits; extended family visits; medical, dental and mental health services; telephone use; marriages; inmate handbooks; unit rules; fire evacuation and safety rules; medical consent forms; mail, interpreter requests; commissary ordering procedures; fund transfers; transfer inquiry; disposal of property; sex offender registration; detainer notice; drug testing; property

Translation Suit (cont.)

and laundry; translation services and release review criteria.

All DOC law libraries will be required to have specified legal materials on immigration and English-Spanish legal dictionaries. Libraries will provide Spanish language recreational and reference reading materials.

All DOC facilities will have at least one full time employee who is a qualified interpreter, prisons with more than 750 prisoners will have at least two. If the DOC cannot recruit qualified staff, telephone translation services will be provided in the meantime until the staff are hired. Phone companies provide translation services and all DOC facilities will be authorized to utilize them.

Prisoners will be entitled to a Spanish translation of all disciplinary reports and any other documents related to a disciplinary, ad-seg, grievance or classification hearing or meeting conducted within the prison. This includes translation of all appeals and hearing officer decisions. The specific items for translation are itemized in the agreement. Translation services, either in person or via telephone translators, must be pro-

vided for all medical, dental and mental health programs, including labels on prescriptions. For medical emergencies or incidents occurring after regular work hours telephone translation will be used.

At the prisoner's request the DOC will provide translation of crucial legal documents, including subpoenas, complaints, summons, notices of hearings, etc. Indexes of DOC policies will be available in Spanish and any policy not already in Spanish will be translated on request. Staff are instructed to request a translator if adequate communication is not occurring due to a language barrier.

Effective January 17, 1996, the DOC must notify, in Spanish, all prisoners in its care of the Spanish language materials and services that are available and the process by which they can access those services. All prisoners entering the reception center will be allowed to receive their orientation in Spanish and include information on how to access Spanish language services. Each facility must provide a Spanish language orientation as well.

Because this is not a consent decree, the DOC agrees to implement the terms of the agreement within a 12 to 18 month period and to maintain that compliance

for a 12 month period after which it is under no obligation to maintain compliance. During the enforcement period it can be enforced as a contract in state court.

One of the key elements in meeting the enforcement provision of the decree is that counsel in the case needs to be informed as to whether or not the WA DOC is complying with the agreement and providing the services it has agreed to. The agreement is supposed to be translated and posted on bulletin boards and in law libraries. Any situations of non-compliance, after January 17, 1996, should be reported to: John Midgley, Evergreen Legal Services, 101 Yesler Way, Suite 300, Seattle, WA 98104.

While I hesitate to call this a landmark case it is significant in that there are no reported cases dealing with these issues, probably because prisoners who can't speak English can't very well petition the courts. As the number of non-English speaking prisoners in American prisons increases, rights conscious jailhouse lawyers should consider initiating similar suits on behalf of these prisoners. Since we first mentioned this suit in *PLN* last year I have received two inquiries from other states on this type of litigation. Please keep *PLN* posted of similar litigation. ■

Detainees May Be Disciplined

The court of appeals for the first circuit has reversed a district court ruling that pretrial detainees may not, consistent with the constitution, be punished for misconduct in the jail. In the Dec. '94 issue of *PLN* we reported *Collazo Leon v. US Bureau of Prisons*, 855 F. Supp. 530 (DC PR 1994). Collazo Leon was held in pretrial detention while awaiting trial. A jail guard claims that he was offered a bribe to let Collazo escape. Collazo was infracted, found guilty and sentenced to segregation and loss of privileges. He sought a writ of habeas corpus by arguing the well established law that pretrial detainees may not be punished while awaiting trial. The district court agreed and granted the writ. The appeals court has vacated and remanded.

In *Bell v. Wolfish*, 441 US 520, 99 S.Ct. 1861 (1979) the supreme court held

that pretrial detainees may not be punished prior to an adjudication of guilt by a court. To do so violates due process. In this case the BOP argued that it was "disciplining" Collazo while he argued he was being "punished." The court in this case said these were semantic terms and there was no difference between the two. "If there is a reasonable relation between the sanctions and legitimate institutional policies, an intent to punish the detainee for prior unproven criminal conduct cannot be inferred. Accordingly, this court must determine whether the punishment imposed here was incident to some legitimate governmental purpose."

The court held that jail officials "must be free, within appropriate limits, to sanction the prison's pretrial detainees for infractions of reasonable prison regulations that address concerns of safety and security within the detention

environment." The court agreed with the district court that Collazo was punished but disagreed that it was improper under the circumstances. The court relied on prison cases to reach its ruling that prison officials can impose punishment on pretrial detainees to enforce prison/jail rules. This ruling contradicts well established law from other circuits that have held that pretrial detainees, because they have not been convicted of a crime, cannot be punished, forced to work, etc. Essentially the court wants to treat detainees, those too poor to make bail, as if they were already convicted felons consigned to prison. The case was remanded to the lower court to determine if Collazo's procedural due process rights were violated at the disciplinary hearing. See: *Collazo Leon v. US Bureau of Prisons*, 51 F.3d 315 (1st Cir. 1995). ■

Ohio Mental Health Decree Entered

A far reaching consent decree governing the delivery of mental health care to Ohio prisoners was entered on 10 July 1995. The consent decree resulted from a §1983 suit filed in 1993 and certified as a class action on June 7, 1995. The prisoner plaintiffs were represented by Robert B. Newman and Alphonse A. Gerhardstein, both Cincinnati attorneys.

The consent decree covers all adult male and female prisoners in the state of Ohio who are incarcerated under the control of the Ohio Department of Rehabilitation and Correction (DRC). The stated objective of the consent decree is to provide "for a comprehensive system of constitutionally mandated mental health care" for Ohio prisoners. Any litigators who are involved with or contemplating an action to obtain "constitutionally mandated" mental health care within a state prison system may find a review of this consent decree to provide some useful information.

The decree mandates that mental health services "shall be provided to inmates in the least restrictive available environment and by the least intrusive measures available..." It calls for the DRC to provide mental health services "within the framework of a community health model," which among other things mandates that prisoners "with serious mental illness will be distributed relatively evenly throughout the DRC system..."

Prisoners with serious mental health illness "shall not be barred from participation in available prison programs solely because of their illness."

The court defines and describes an appropriate "constitutionally mandated" mental health services delivery system, which includes the following:

All prisoners entering the Ohio DRC "shall be the recipients of mental health screening upon admission to the prison system." The screening will be accomplished by use of a standardized form, administered by persons trained in the use of such a screening process. The screening process "shall maintain a low threshold for follow-up evaluation..." Mental health evaluations shall be performed by "appropriate mental health professionals," and may result from the

initial intake screening or by later referral. Also, "Information regarding the access to mental health care shall be incorporated as part of every inmate's initial reception and orientation to... DRC institutions..."

One of the most interesting sections of the decree relates to "constitutionally mandated" mental health staffing levels. The decree directs the DRC to "hire and place in service such additional mental health staff as is required to reach a total of 246.5 mental health staff based on a total DRC prison population of 40,253 inmates." This works out to a ratio of one mental health staff per 263 prisoners. The decree mandates that those positions "shall be allocated solely to the provision of mental health services..." It also mandates the hiring of additional psychiatrists to reach a level of one psychiatrist for every 1,579 prisoners.

The mental health service delivery model encompassed by this decree sets forth a three tier level of mental health services: Inpatient hospital beds for long term care, "Residential Treatment Units" (RTUs) and "crisis beds" for short term intervention, and "Outpatient Care" for mentally ill prisoners in general population.

The DRC defendants agree to provide "not less than 120 inpatient hospital beds for male inmates and 11 inpatient hospital beds for female inmates..." which works out to one bed per 307 prisoners. They also agree to provide 710 residential beds (1 per 57 prisoners) to be allocated evenly among all DRC institutions. Allocated bed space will be adjusted up or down in proportion to changes in the DRC population.

The decree describes the delivery system for medications, including "forced medication," which "shall in all respects comply with *Washington v. Harper*, 494 U.S. 210 (1990)." Also defined and described are procedures for making housing assignment decisions for mentally ill prisoners, suicide prevention procedures, restrictions on the use of physical restraints and of placing mentally ill prisoners in "Control Units," procedures for conducting disciplinary hearings for mentally ill prisoners, developing a comprehensive medical records system and mental health clas-

sification system, staff training, and procedures to follow when transferring mentally ill prisoners from prison to prison.

The court appointed Professor Fred Cohen, L.L.B., of the School of Criminal Justice, The University of Albany, New York to monitor the consent decree. The decree has a five-year enforcement period. Attorney Alphonse Gerhardstein has estimated that it will cost the state of Ohio some \$50 million to implement the decree in its first two years.

As stated above, those who are engaged in or contemplate litigation in the area of mental health services to prisoners would be well advised to obtain and review a copy of this decree. Copies of the consent decree can be obtained by writing the Clerk of the Court, U.S. District Court for the Southern District of Ohio, Western Division. The case is: *Juan Dunn et al., vs. George V. Voinovich, et al.*, Case No. C1-93-0166. ■

Ohio Prison Doctor Imprisoned

Harry Schutte was the medical director at the Marion Correctional Institution in Marion, OH when his license to practice medicine was suspended after he was arrested and convicted for forging prescriptions. Schutte, who was addicted to the drug Stadol and synthetic morphine, did not notify prison officials of his license suspension and he continued to practice medicine at the prison and gave them false credentials indicating he had a valid license.

The Ohio State Medical Board revoked Schutte's license permanently based on his felony convictions for forging prescriptions and practicing medicine while his license was suspended. The board stated "His continued practice of osteopathic medicine and surgery after his certificate was suspended, in blatant disregard for the board's regulatory authority, is appalling." Schutte is serving a ten year prison sentence. No mention was made of the treatment he provided to the Ohio prisoners who relied on him for care. ■

Source: *Columbus Dispatch*, October 15, 1995.

Jail Detainee Entitled to Law Library Access

A district court in Texas has held that jail prisoners have a right to law library access in order to defend against lawsuits in which they are the defendant, the court also held that a "bookmobile" system of allowing prisoners to check out specifically requested law books on a periodic basis is constitutionally impermissible. Henry Marange was held in the Orange County, Texas, jail on charges of vehicular manslaughter. While awaiting trial for criminal disposition of those charges the victims' family sued him. The victims' survivors obtained a default judgment of more than \$12 million against Marange. After being served with the suit Marange asked jail staff how to go about obtaining counsel to represent him, he was told counsel was not available in a civil action. Marange contacted the court clerk for assistance and received no reply. Marange then requested law books. The jail had no trained law librarian but a guard who would bring prisoners specifically requested books via a "bookmobile" if the book was available. Marange made numerous requests for books on civil lawsuits and procedure, to no avail. All told, Marange received only one book, a day after default judgment was entered against him.

After arriving in state prison Marange realized his constitutional rights had been violated and he filed suit against the county sheriff contending he should have been provided with access to an adequate law library. The sheriff countered that Marange had no realistic chance of prevailing in the suit against him and was therefore not prejudiced by the law library denial. Likewise, the sheriff argued that his law library procedures were constitutional and that all of Marange's book requests were honored.

The district court gave an interesting analysis in this case. In *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977) the supreme court held that prisoners have a constitutional right of meaningful access to the courts. The state must provide prisoners with this access and bears the burden of proving that the means chosen is adequate. This right can be satisfied by providing prisoners with appointed counsel, access to a law library or access to legally trained paralegals. Those held in county jails are also en-

titled to *Bounds* access to the courts. See: *Hooten v. Jenne*, 786 F.2d 692 (5th Cir. 1986); *Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985); and *Cruz v. Hauck*, 515 F.2d 322, 332 (5th Cir. 1975). The court held that Marange's nine month period of detention in the jail was sufficient to trigger his right to court access.

"Procedures like those employed by Sheriff Fontenot at the Orange County Jail have been described as a 'bookmobile' system. [Editors' Note: Other circuits have referred to it as an "exact cite" system.] It is well established in this circuit that a 'bookmobile' system is a constitutionally impermissible method of providing prisoners with court access. *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986); *Morrow*, 768 F.2d at 623." The court held that the jail's exact citing system "was constitutionally inadequate at the time of plaintiff's confinement."

Until now it had been an open question in the fifth circuit whether prisoners and detainees were entitled to *Bounds* access in order to defend against civil suits, as opposed to initiating civil rights and habeas claims. This issue was in doubt because in *Morrow* the fifth circuit stated that prisoners' right of court access does not include the right to *all* legal filings but only to constitutional claims. The court noted that *Corpus v. Estelle*, 551 F.2d 68, 70 (5th Cir. 1977) ruled that "reasonable access to the courts must include access to general civil legal matters, including but not limited to divorce and small claims." *Starub v. Monge*, 815 F.2d 1467 (11th Cir. 1987) also held that the state may not bar court access by prisoners defending against civil forfeiture actions.

The court held that no public policy interest is present in limiting prisoners court access in defending against civil suits. In an interesting comment, the court stated that as more crime victims sue criminal defendants for money damages in civil courts more prisoners will be sued. "If the victim of crime is entitled to a day in civil court, surely a civil defendant should be able to meet the allegations. Entry of default judgments in every civil action against imprisoned defendants would only flood state and federal courts with requests for post-judgment relief." The court concluded that

prisoners' right of access to the courts includes legal activities in defending against civil actions.

The court held that the sheriff was entitled to qualified immunity for his actions because the law was not clearly established in the fifth circuit that a prisoner was entitled to law library access in order to defend against a civil action. Marange did not sue the county in this case. The court made alternate factual findings that included an assessment that if Marange had received *Bounds* access he would have probably been able to reduce the amount of damages awarded against him.

In an interesting conclusion, the court noted that Marange had received no damages as a result of his suit but requested that Marange's lawyer submit a request for an award of attorney fees because "Plaintiff succeeded in obtaining a declaration that prisoner's right of access to courts includes the right to *Bounds* assistance in defense of a civil claim. This could prove significant for other inmates as future victims' rights lawsuits increase." The court thanked Jay Tantzen, the appointed counsel who represented Marange in the case. See: *Marange v. Fontenot*, 879 F. Supp. 679 (ED TX. 1995). ■

South Korean Political Prisoners Protest

In early August, 1995, hundreds of political prisoners began a hunger strike to demand their freedom and the end of national security laws that prohibit contact with people in North Korea. The government denied the strike was taking place and stated that anyone taking part would be denied release because amnesty was only for those who "showed good behavior." Many of the prisoners on strike have been held in prison for over 30 years, solely for being communists or socialists.

On August 15, 1995, the South Korean government granted amnesty and freed 1,780 prisoners, many of whom were political prisoners. Over 440 political prisoners remain behind bars. No change has been made with regard to harsh laws that punish any expression of sympathy or support for North Korea. ■

Source: *Workers World*

Sexual Harassment Violates Eighth Amendment

A federal district court in the District of Columbia (DC) granted extensive injunctive and declaratory relief for a class of women prisoners who filed suit challenging their conditions of confinement in DC prison facilities. The rights of women prisoners were also violated under Title IX when they were denied access to educational programs provided to men. The ruling is significant for several reasons. This is the first time a court has held that sexual harassment violates the eighth amendment and it is the first published case to apply the dictates of *Farmer v. Brennan* in fashioning injunctive relief in a class action suit. The court's ruling came after a three week trial. The suit covers three facilities housing women prisoners and includes the jail. The claims raised were that women prisoners are subjected to sexual harassment, receive unequal opportunities to participate in prison programs compared to similarly situated male prisoners; obstetrical and gynecological care provided is inadequate; and the general conditions of confinement at the three facilities violate the eighth amendment. In short, almost everything that could be wrong with a women's prison was. The lengthy ruling, by Judge June Green, will be helpful for women prisoners as well as anyone litigating conditions of confinement class action suits.

The factual scenario painted by the court is grim and disgusting. The evidence presented on the sexual harassment claims include guards sexually assaulting and raping prisoners, unsolicited sexual touching by guards, sexual comments by guards towards female prisoners and forcing prisoners to expose their genitals to guards. The court lists incident after incident of rape, sodomy, groping and assault by guards on prisoners. Sexual comments and threats by guards were commonplace. This conduct was carried out by a wide variety of DOC employees. The court referred to the DOC's sexual harassment policies as being of "little value because the defendants address the problem of sexual harassment of women prisoners with no specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions." Women prisoners who complained of this conduct were routinely retaliated against and no meaningful investigations ever took place. Whenever

a guard was found to have sexually assaulted a prisoner the guard was never disciplined, at best they were transferred to a different part of the prison to work.

Complaints of sexual harassment were not treated confidentially and were treated as "jokes" by staff. The court lists complaint after complaint that was ignored or otherwise disregarded by DOC officials. The court noted that sexual harassment has profound physical and mental consequences for its victims. The court held that "These evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency. The physical assaults endured by women prisoners... unquestionably violate the Eighth Amendment. Rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are 'simply not part of the penalty that criminal offenders pay for their offenses against society.'"

The court also held that "vulgar sexual remarks" by guards, the lack of privacy in cells, the refusal of some guards to announce their presence in living areas "constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners." The court also condemned routine invasions of women prisoners' bodily privacy, such as guards looking into women's cells, holding it violates the eighth amendment.

At trial, expert witnesses testified about the health problems caused by sexual harassment. The court held this furnished "more than enough evidence to satisfy the objective component of the Eighth Amendment analysis." The court held the defendants had also violated the prisoners' eighth amendment rights by acting with deliberate indifference towards prisoners' safety by failing to investigate complaints, discipline staff predators, etc.

The court found that obstetrical and gynecological care violated the eighth amendment due to its inadequacy and various practices by the DOC. Despite a policy mandating a prompt gynecological exam of all incoming prisoners, the exams are not given. Prisoners are not tested for sexually transmitted diseases. Pap smears are not given and when such tests are given and reveal illness or abnormality, follow up care and treatment

are often not given. The court cites numerous instances where prisoners weren't delivered to hospitals on time for treatment, pregnant women were shackled to beds, etc. The care provided to pregnant prisoners was also woefully inadequate. This included placing miscarriaging prisoners in cells on a metal bed without a mattress, taking women in labor to court appearances, women delivering babies in their cells, transporting pregnant women in leg shackles, handcuffs and a belly chain with a box that connects the belly chain to the handcuffs. The DOC also did not provide opportunities for post-partum prisoners to visit their babies while the babies board at the hospital.

The court held that the medical care provided to women prisoners by the DOC violated the eighth amendment and community standards of appropriate health care. In addition to failing to provide reliable transportation, treatment and sick call procedures, the DOC also fails to meet its own standards of health care. These conditions violate D.C. law and standards. The court analyzed the prisoners' claims on the shackling pursuant to *Wilson v. Seiter* which is an "infliction of pain" standard rather than *Estelle v. Gamble*, the Supreme Court's medical indifference standard. The court held that shackling pregnant prisoners, and women in labor and shortly thereafter is inhumane. "The combination of a lack of child visitation and inadequate child placement counseling at CTF constitute an Eighth Amendment violation because they have a mutually enforcing effect which results in an unacceptable risk of trauma for women prisoners who have recently delivered babies. Few events could be more stressful than the forced separation of a parent from his or her child. Though the injuries which flow from the defendants' actions in this area are primarily psychological, there is nothing to suggest that the eighth amendment is limited to physical injury." The court also held that forbidding child visitation when babies are held at the hospital and denying mothers child placement counseling "further no legitimate correctional policy."

Conditions of confinement at the three women's facilities were also held to violate the eighth amendment. One of the closed facilities, despite being relatively new, is plagued by problems in its heating system which causes low cell

Sexual Harassment (cont.)

temperatures (i.e. icicles on inside cell windows) and results in numerous health problems. The sewage system functions poorly exposing prisoners to raw sewage. Showers leak, damaging ceilings and injuring prisoners. Cart liners are not used in transporting laundry resulting in the spread of germs. Cleaning supplies are rarely available and the prison is infested with rodents. Likewise, food delivery is unsanitary. All three facilities were infested with roaches, lacked adequate fire escapes and sanitation and safety measures.

The court held that the risk of injury by fire was so serious at one facility that it violated the eighth amendment. The situation violated the objective component of an eighth amendment standard because conditions reinforced each other: overcrowded dormitories, with a heavy combustible load, walls unable to contain a fire, locked fire exits, no fire alarm or sprinkler system and rarely conducted fire drills. The court held the defendants knew there was a serious risk of harm but refused to act, thus showing deliberate indifference to the prisoners' well-being. The court held that the physical conditions of the three facilities also violated the eighth amendment. The plaintiffs prevailed on their claims concerning sanitation, inadequate ventilation, low cell temperatures, unsanitary food preparation. The court referred to DOC documents which sought to avoid litigation risks by only housing short term prisoners at one facility, this "suggests a general strategy to avoid repairing poor conditions." These conditions also violated various provisions of the D.C. code and laws.

The court also ruled in favor of the plaintiffs on their claim that they were excluded from programs that similarly situated male prisoners were given access to. The court found that the defendants had violated Title IX of 20 U.S.C. § 1681(a) which forbids gender discrimination by educational programs receiving federal funds. The court discussed the legislative history of this law as well as the few court decisions applying it to prisons. While cases applying this law outside of prisons have required a discriminatory intent, the court noted that such intent is needed only when

facially neutral policies are at issue. When classifications are gender based, no inquiry into intent is necessary. "Defendants' policy of segregating male and female prisoners is just such a gender based policy. By virtue of their gender, women prisoners are sent to certain facilities which offer program opportunities that are different from those offered in the male facilities. Though the reasons for sex based segregation in prisons is rational, 'the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.' *United Automobile Workers v. Johnson Controls*, 499 US 187, 199 (1991)."

Analyzing the facts, the court held that minimum custody women prisoners were similarly situated to male prisoners in minimum security. The court rejected the DOC's arguments that women had "unique characteristics" which meant that they were not similarly situated to male prisoners. "A majority of the 'unique characteristics' mentioned by the Defendants are also some of the burdens which historically have prevented women from achieving equality of opportunity. To use these characteristics to defeat a comparison of men and women prisoners would vitiate Title IX and also suggest that men and women could never be compared." The DOC violated the provisions of Title IX in all areas of educational programming, including industrial and vocational training. The court did not review the differences in programming under the equal protection clause because the Title IX analysis was sufficient to grant relief. The court held that women prisoners were not denied equal protection of the law because male prisoners could smoke and they could not. The ban on smoking was rationally related to substance abuse programs offered at the prisons.

The court granted extensive injunctive and declaratory relief to the plaintiffs on all counts on which it found a constitutional or statutory violation. The lengthy order for injunctive relief will be useful to anyone litigating similar claims. The plaintiffs were well represented by Brenda Smith, director of the Women in Prison Project of the National Women's Law Center. See: *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 877 F. Supp. 634 (DC DC 1994). ■

PA Prison Investigated for Corruption; Biggest Shake Down Ever

In September, 1995, several prisoners from the 3,490 man Graterford state prison testified before the Pennsylvania senate judiciary committee about corruption at the state prison. The prisoners testified that prison officials accepted bribes typically between \$100 and \$300 to expunge prisoners' record of infractions. The testifying prisoners, Jonathan Brown, Jerry Logan and Frank Hannon, testified about corruption on the part of specific Graterford employees, including those who smuggled drugs and exchanged favors for sex. They estimated that at least 20% of the 1,100 Graterford staff were involved in illegal activities.

Illegal drugs are rampant at the prison. Since 1989 at least 13 prison guards, including three in 1995, have been charged with drug smuggling. In the same period 11 Graterford prisoners have died of drug overdoses. All of the testifying prisoners said they had been threatened and harassed for testifying. Brown testified that guards had told him they would kill him if he testified. Senator Michael O'Pake said "The picture they painted was one of a cesspool of corruption." Pennsylvania DOC officials had no comment on the hearings.

The FBI has announced it is investigating the allegations of drug smuggling at Graterford. On October 24, 1995, 650 state and federal law enforcement officials descended on Graterford to conduct a massive shakedown on the 1,700 acre prison. The raid was characterized as the largest of its type in US prison history. State Corrections Commissioner Martin Horn said that one third of all drug sales in the state prison system occur at Graterford. "At some point it began to spin out of control," he said. Presumably it began spinning with the first senate hearing.

Shortly after the raid began the deputy prison superintendent, and chief of all guards announced their retirement. Two captains, four lieutenants and a hearing examiner were temporarily transferred pending investigation. The search uncovered a few ounces of marijuana, cocaine and heroin and dozens of weapons. ■

Source: *Post Intelligencer*, October 25, 1995.

No Change in Michigan Consent Decrees

For almost 20 years Michigan state prisoners have been embroiled in class action prison litigation designed to ensure constitutional conditions within the Michigan prison system. Despite entry of consent decrees, the Michigan DOC has constantly sought to terminate their legal obligations imposed under the decrees. In twin rulings on motions to modify the contents of those decrees in *Hadix v. Johnson* and *Glover v. Johnson* district judge Feikens denied modification of the decrees.

While reported separately both rulings contain verbatim language outlining the lengthy history of these cases and their seemingly endless nature, along with comments on prison reform litigation in general. Of course, the court did not state that if the DOC simply complied with obligations it had agreed to meet instead of evading them by constant litigation the matter would be resolved.

In *Hadix* the issues agreed to by the parties included increasing out of cell activity by prisoners at the central prison complex in Jackson, MI. This includes access to general and law libraries, visiting, education, jobs, etc., for no less than seven hours a day on weekdays and five hours a day on weekends. In *Rufo v. Inmates of the Suffolk County Jail*, 502 US 367, 112 S.Ct. 748 (1992) the supreme court set forth the test to be used in ruling on parties' motions to modify consent decrees. Applying those principles in these cases the court held modification was inappropriate because there had been no substantial change in conditions warranting such change.

Most of the issues raised are specific to these cases, ranging from the number of prisoners employed in industries, academic programs, etc. Of interest is the argument by the defendants that one of the conditions that had changed, warranting modification of the consent decrees, was that "public opinion with regards to the 'rights' of prisoners has changed." "Specifically, defendants point out that the sentiment of the public is against college programming for prison inmates. Defendants contend that it is the desire of the public that its prisons discontinue providing college programming for prisoners. According to defendants, enforcement of the decree is

contrary to the public interest under *Rufo*."

The court rejected this argument, holding the defendants had misinterpreted *Rufo*. "A decree is detrimental to the public interest when there is an increased risk of harm to the public if the decree is enforced." Examples include allowing decree modifications to prevent premature release of accused violent felons. "Defendants have not pointed to any increased risk of harm to the public if college programming is continued in spite of the public sentiment. In fact, numerous studies reveal that prisoners who receive college programming are less likely to commit crimes upon release. A change in public opinion does not mean that the continuation of college programming is detrimental to the public interest and does not warrant modification of the consent decree under *Rufo*."

The court rejected modification of the decree on numerous other issues applicable solely to Jackson prisoners as well. See: *Hadix v. Johnson*, 879 F. Supp. 743 (ED MI 1995).

Glover involves the class action suit filed by women prisoners in Michigan designed to gain programs and services comparable to those provided to male prisoners. It too is a long running class action suit that has been heavily litigated. The defendants moved to modify the consent decree monitoring in this case. The court termed it as, in reality, an effort to dissolve the decree by exempting themselves from court monitoring for compliance.

The court denied the motion holding that there was insufficient evidence to show that the defendants were meeting their obligation of providing women prisoners with meaningful access to the courts. This included whether there was an adequate pool of writ writers in the prisons and their adequacy. Likewise, the court found the defendants were not in compliance with numerous other aspects of the decree, such as educational opportunities, work passes, vocational programming, etc. Thus, the defendants were not entitled to modification or termination of the decree. See: *Glover v. Johnson*, 879 F. Supp. 752 (ED MI 1995).

In both cases the court asked the question "How is finality reached in these public agency-public law cases?" Here at PLN we would say when the defendants have complied with the terms of the agreement as they are obligated to. The court answered this by saying when the agency is in "substantial" rather than total compliance with the agreement. The court stated that within 60 days after December 31, 1996, it will determine whether compliance has been substantially accomplished with both cases with the goal of terminating its jurisdiction over the case. While not expressly saying so, it appears the court intends to dissolve both consent decrees and rid itself of the litigation. The court stated it was following the teaching of *United States v. State of Michigan*, 18 F.3d 348 (6th Cir. 1994) and would follow that procedure in determining the finality of litigation in these cases. ■

TRO Granted in Alaska Sex Offender Registration

Since 1990, when Washington state passed the Community Protection Act (CPA), many states have followed suit and copied its provisions. The Washington CPA is one of the most draconian laws of its type in the country concerning the registration and civil commitment of sex offenders. Ironically, it has withstood repeated attack in Washington state courts, while federal courts in other states have struck down similar laws shortly after they were passed. Over the years *PLN* has reported on the legislative developments as well as the legal rulings on these issues.

In 1994 the Alaska legislature passed House Bill 69, codified as AS 01.10.070, effective on August 10, 1994, the law required all convicted sex offenders to register with police and allowed for the public dissemination of that information. Two sex offenders, convicted before 1994, filed suit in federal court claiming that the law violated several of their constitutional rights, including their fourth amendment, privacy and ex post facto rights. They sought a Temporary Restraining Order (TRO) to prevent implementation of the law pending an outcome of the litigation. The district

TRO on Registration (cont.)

court granted the TRO with regards to the public dissemination requirements of the law. In its ruling the court gave extensive discussion and analysis to cases challenging similar laws in other states.

The court gave an extensive discussion to the ex post facto claims and found the law did not violate the plaintiff's ex post facto rights. The court held that registration, as such, did not constitute "punishment" for constitutional purposes. However, the public dissemination of the sex offender registration was intended to have a punitive effect and did constitute punishment. "It is this court's conclusion that plaintiffs are likely to succeed on the merits of the claim that the Registration Act violates the prohibition on ex post facto legislation, because the law includes a provision providing for public dissemination of sex offenders whose convictions antedate the Registration Act." The court held that it was likely the plaintiffs would be able to show violation of the guilty pleas entered at the time to their original convictions because the legislation effectively increased their punishment. The court noted that the constitution prohibits an increase in a defendant's punishment, regardless of whether the defendant's guilt is adduced by a plea or at trial.

"Plaintiffs have established a likelihood of successfully challenging the constitutionality of the Registration Act as a violation of the prohibition against ex post facto laws. The only constitutional infirmity plaintiffs are likely to prove is that creation of a central registry providing for the dissemination of information to the general public is impermissible." The court noted the statute has a severability clause so that if a portion of the statute is struck the remainder continues in effect. Readers will note this is not a ruling on the merits, only a ruling for a TRO. The court also gave an extension discussion to the plaintiff's motion to proceed anonymously, which it denied. It remains unclear whether any aspect of the law, including the public dissemination portion, would be unconstitutional if applied to a sex offender convicted after the law was signed into effect. See: *Rowe v. Burton*, 884 F. Supp. 1372 (D AK 1994). ■

Florida Repeal of Earned Time Law Upheld

In 1988 the Florida state legislature enacted Fla.Stat. § 944.277 (1988) which extended the amount of gain-time awarded to prisoners. This was one of several statutes enacted by the Florida legislature in order to maintain the Florida prison population within the limits imposed by a series of federal court orders. In 1992 the Florida attorney general's office issued an opinion interpreting 1992 legislative changes to the statute which made prisoners convicted of murder or attempted murder ineligible for provisional credits previously earned.

Calvin Herring, a prisoner serving time for second degree murder, was stripped of 1,540 days of provisional earned time pursuant to the 1992 change to § 944.277. He filed a petition for habeas corpus claiming that the retroactive application of the statute which stripped him of good time he had already earned violated the ex post facto provisions of the constitution. The district court disagreed and denied the writ. In its ruling the court gave an extensive history of

various Florida good time statutes and their legislative background. This case is one of limited application applying only to those Florida prisoners retroactively deemed inapplicable for receiving additional earned time credits.

The eleventh circuit has already addressed the issue and held that the prospective denial of provisional credit under § 944.277 and the retroactive application of control release under § 941.146, did not violate the due process or ex post facto provisions of the constitution. See: *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995).

The court cited extensive cases from Florida state courts addressing this issue, all of which have resulted in losses to prisoners. The court also rejected an equal protection claim in this case, holding that Herring was not similarly situated to prisoners who had already received the application of the relevant credits and had already been released. See: *Herring v. Singletary*, 879 F. Supp. 1180 (ND FL 1995). ■

Denying Witnesses in Disciplinary Hearings Illegal

A federal district court in Massachusetts has held that a prison policy denying witnesses from the prison's general population to segregated prisoners' disciplinary hearings was unconstitutional. Brendan McGuinness is a Massachusetts state prisoner who was incarcerated for allegedly getting into a fight with a guard. At the disciplinary hearing McGuinness requested that a prisoner who witnessed the incident be called to testify on his behalf at the hearing. The policy at MCI Cedar junction was to automatically deny all requests for witnesses from the prison's general population. McGuinness filed suit contending that this policy violated his constitutional rights. The district court held a bench trial and issued a ruling of declaratory judgment.

"It is the ruling of this court that, properly interpreted, *Kenney v. Commissioner of Corrections*, 393 Mass. 28, 35, 468 N.E.2d 616 (1984), stands for the proposition that witnesses cannot be denied in a disciplinary hearing simply based upon the location of the individual within the prison. *Abrazinski v. DuBois*,

876 F. Supp. 313, 323 (D Mass 1995)(stating that the *Kenney* court 'found that isolation in a segregation unit alone, even if legal, is not sufficient to support a denial of witnesses);... There must be more. There must be some case-specific determination supporting the hearing officer's decisions regarding the denial of witnesses, rather than rote application of a blanket general policy."

The court noted that Massachusetts DOC policy states that prisoners shall be allowed to present evidence and witnesses at disciplinary hearings unless certain predicates are met. "The regulations thus contemplate, if not demand, a case-specific determination that security or other valid institutional objectives require or allow the denial of an inmate's request to present witnesses at a disciplinary hearing." Disciplinary hearing officers cannot rely on institution policies which remove all discretion from their decisions. The court held that as a result, the disciplinary hearing was "void and to no effect" and could not be used for any effect by the Massachusetts DOC. See: *McGuinness v. Dubois*, 887 F. Supp. 20 (D Mass 1995). ■

Charging for Medication May Violate Eighth Amendment

A federal district court in Indiana has held that requiring prisoners to pay for medication when they are able to does not violate the eighth amendment. However, prison officials' refusal to provide over the counter medication to indigent prisoners with serious medical problems violates the eighth amendment. As more and more prisons attempt to charge prisoners for medical care this issue will be litigated as this area of law is new and developing. On May 17, 1993, the commissioner of the Indiana DOC (IDOC) enacted a policy under which prisoners would not be allowed to use sick call as a means by which to obtain over the counter (OTC) medications. Instead, such medications would be sold on the prison commissary and sold to prisoners at cost. The policy states that the DOC will provide OTC drugs needed to treat prisoners with serious medical conditions.

This case involves Lester Martin, an Indiana state prisoner with a history of painful ulcers. After going on sick call and requesting medication for his ulcers he was told that even though he was indigent he would have to purchase his ulcer medication off the commissary. A prison doctor stated Martin should receive the medication as soon as possible. Martin told his counselor of this and the prison business office was contacted. However, due to his indigence, Martin did not receive the medication for another eight days. He filed suit claiming that the delay and the OTC medication policy violate his eighth amendment rights. Martin moved for summary judgment which the court denied.

"The Constitution requires that prison officials establish medical facilities for prisoners, and provide prisoners with medical assistance." *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983). Such medical systems and care must meet minimal standards of adequacy.

Martin claimed that the Indiana DOC policy required that indigent pris-

oners be provided with free OTC medication for treatment of serious medical needs and that this policy was violated by requiring him to purchase the medication. The court noted that violation of prison policy does not state a claim under either the eighth amendment or § 1983. The court framed the question as to whether Martin had a serious medical need within the meaning of *Estelle v. Gamble*, and if so, does the constitution entitle him to free OTC medication to help treat that condition or whether the OTC medication policy and its application to Martin constitutes deliberate indifference to his serious medical needs.

"The defendant's approach has produced a colorable constitutional claim costing the state and federal taxpayers thousands more than the cost of that medicine."

The IDOC policy does not include ulcers among the conditions requiring free OTC medication. The court noted that courts need not defer to the judgment of prison officials in medical cases. "Courts determine what constitutes a serious medical need on a case by case basis. As a general rule, a serious medical need is one that a physician has diagnosed as mandating treatment or one which is so obvious that even a lay person would easily recognize the necessity of a doctor's attention." Several courts have identified ulcers as serious medical conditions because when left untreated they can cause intense and persistent pain and may require emergency surgery. In this case a doctor had identified Martin's ulcer condition as one requiring treatment and had prescribed OTC medications as part of that treatment. Once the serious medical need has been identified, the eighth amendment prohibits deliberate indifference to that need.

In *Bent v. Peck*, 825 F. Supp. 1411 (SD IA 1993), [PLN, Vol. 5, No. 1], the court held that the state is required to provide treatment to serious medical needs at state expense. The court held that the state is responsible for paying for the medical care it has a constitutional duty to provide. The court in this

case disagreed with the holding in *Bent*. "Nothing in the Eighth amendment, which prohibits punishment, requires a state to provide an inmate, free of charge, with a necessary commodity that would not be free outside the prison walls and which the inmate has the legal means to obtain." The court stated that the eighth amendment means only that the state will not ignore a prisoner's serious medical needs, not that he will receive free medical care. The court held that if the prisoner has the money to afford medication but chooses not to buy them prison officials are not indifferent to the prisoners' medical needs.

The court held that summary judgment was not appropriate in this case because it was not clear if

Martin could debit his account to buy medication or if he could afford to buy it. The court noted that if prison officials refused to provide Martin with prescribed medication, whether OTC or not, when he couldn't afford to pay for it, they would be liable to him for a constitutional violation. These issues could not be resolved on the record. Likewise, the court could not resolve the constitutionality of the IDOC policy because later amendments to it were not before the court. The matter was set for trial.

As more and more states pass this type of policy it is interesting to read the court's conclusion in this case. Referring to the *Bent* court's comment about a \$12 pair of glasses going to trial (PLN commented on this at the time) this court stated: "This is a dispute of constitutional magnitude about the payment of less than four dollars for medicine. Regardless of whether the directives at issue ultimately are found to have violated anyone's constitutional rights, the defendant's approach has produced a colorable constitutional claim costing the state and federal taxpayers thousands more than the cost of that medicine. One wonders at the role of common sense in all this." See: *Martin v. Debruyne*, 880 F. Supp. 610 (ND IN 1995). ■

NJ Prisoners Have Liberty Interest in Staying in Population

The court of appeals for the third circuit has held that New Jersey state prisoners have a due process liberty interest, enforceable in federal court under § 1983, to remain in general population. David Sheehan is a *PLN* reader at the New Jersey state prison in Trenton. While housed in the prison's general population he was ordered to move to a different cell, he refused, was infraacted and placed in segregation. The disciplinary charges were later dismissed but Sheehan was not released to general population. Instead he spent nearly a month in segregation allegedly because there was insufficient room for him in population. Sheehan filed suit claiming that the initial decision to transfer him to another housing unit was in retaliation because of his choice to remain unemployed within the prison while he worked on litigation. The district court dismissed the suit holding that Sheehan had failed to show evidence of retaliation and that he was properly retained in close custody.

The court of appeals for the third circuit affirmed in part, vacated in part and remanded for further proceedings. The court held that New Jersey state "gave Sheehan a constitutionally protected liberty interest in being returned to general population after he was found 'not guilty' of the disciplinary charge...." The court gave a lengthy discussion of the creation of due process liberty interests, noting that as a matter of federal law prisoners have no right to remain in a particular cell, prison or state, but such rights can be created by state laws that substantially limit the discretion of prison officials in moving or transferring prisoners. *Layton v. Beyer*, 953 F.2d 839 (3rd Cir. 1992) had previously held that New Jersey law creates such a liberty interest.

The appeals court upheld the district court ruling that Sheehan was properly segregated pending disposition of the disciplinary charge, but reversed as to Sheehan's retention in segregation. "We think *Layton* controls this case. If an inmate has a liberty interest which requires his return to the general population when a hearing is not held within

a reasonable time after he is placed in close-custody pending disposition of a disciplinary charge, we believe he also has a right to be returned to the general population within a reasonable time after the disciplinary charge that put him in close custody is dismissed."

The court cites rulings from other circuits that reached the same conclusion. "...[T]hough there is no state law or regulation that determines precisely when an inmate is to be returned to the general population after he is found not guilty of a disciplinary charge, an inmate may not be unreasonably or arbitrarily detained in close custody. Accordingly, we hold that Sheehan had a protected liberty interest in being returned to the general population within a reasonable time after the disciplinary charge against him was dismissed."

The court held that a factual dispute existed between the prison officials' claim that no cell vacancies existed at the time of Sheehan's segregation. In the lower court proceedings Sheehan requested documents showing that such vacancies existed, the defendants claimed no such documents existed. In opposing summary judgment Sheehan produced weekly census and wing counts showing that such information did exist. The appeals court held that the dispute as to the availability of cells in general population did not support summary judgment in the defendant's favor. Sheehan presented strong evidence to the appeals court that the DOC defendants had lied to the lower court about the existence of documents probative of his claim. See: *Sheehan v. Beyer*, 51 F.3d 1170 (3rd Cir. 1995). ■

Random Urinalysis Okay

In the July, 1994 issue of *PLN* we reported *Lucero v. Gunter*, 17 F.3d 1347 (10th Cir. 1994) where the court of appeals reversed dismissal of a Colorado state prisoner's suit alleging a fourth amendment violation where he was subjected to a harassing urinalysis test. The court had held that while random UA's comport with the fourth amendment's requirement that searches be reasonable, if Lucero could show that the tests were not administered in a random manner, then a fourth amendment violation could be established. On remand the lower court held that the UA in question was indeed "random." Lucero, a *PLN* reader, appealed the dismissal again and the appeals court affirmed.

This case was determined due to the factual nature of the allegations. Namely, were UAs conducted in a random manner. Finding that they were, summary judgment was properly entered for the defendants. Prisoners should be aware that non random UAs may well violate the fourth amendment. "Courts which have addressed this issue have recognized that although random urine testing of inmates does not violate the Fourth

Amendment, see, e.g., *Lucero*, 17 F.3d at 1350, the procedures for selecting inmates must be truly random. See: *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986); *Storms v. Coughlin*, 600 F. Supp. 1214, 1223 (SD NY 1984). Selection procedures are not truly random and thus violate the Fourth Amendment when the procures leave 'the exercise of discretion as to selected targets in the hands of a field officer with no limiting guidelines.' *Shoemaker v. Handel*, 795 F.2d 1136, 1143 (3rd Cir. 1986)."

The court held that in this case the defendants met their burden of proof by showing prisoners selected for UAs are picked by a computer guided random selection procedure. There was no evidence that the official who selected Lucero was aware of his identity during the selection process. It is worth noting that while the courts claim that non random UAs would violate the Fourth Amendment, virtually no court has ever made such a finding when applied to the facts of a case. See: *Lucero v. Gunter*, 52 F.3d 874 (10th Cir. 1995). ■

RFRA TRO Granted

A federal district court in Arizona granted a Temporary Restraining Order (TRO) to an Arizona state prisoner who filed suit seeking relief for violation of his religious rights to a Kosher diet, to long hair, a colored head covering and to maintain a vow of poverty. Paul Luckette is an Arizona state prisoner who is an "ambassador/priest" of the Freedom Church of Revelation. Luckette filed suit claiming prison officials burdened his right to free exercise of religion and were punishing him for his religious practices.

Luckette sought a TRO which would grant him the relief sought pending the outcome of the litigation. The court granted the motion. In doing so the court gave an ample discussion of the Religious Freedom Restoration Act (RFRA), the legal effect it has had on religious free exercise claims and the applicable standards in granting TROs. The court

discussed the RFRA's legislative history and its application to prisoners.

The court did not grant the TRO with regards to Luckette's claim that he must maintain a vow of poverty but it was granted with regards to the request for long hair and beard, a colored head garment and a kosher diet. The court discussed numerous court cases, both under the RFRA and under the supreme court's ruling in *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct. 2400 (1987). The RFRA overruled *O'Lone*, reestablishing prior supreme court rules which leave the burden on the government to show that any restrictions on religious freedom are "substantially related" to governmental objectives. The court discussed irreparable injury to the plaintiff if the TRO was not granted, the government's burden of proof in such cases, etc. None of this analysis is new or novel, given prior rulings by other

courts considering the application of the RFRA to prison.

The court noted that courts considering prisoner RFRA claims should conduct an inquiry into the legitimacy of the plaintiff's religious beliefs, without judging the merits of the religion itself, in order to manage its resources by weeding out bogus claims from genuine ones. Likewise, plaintiffs must show the state has substantially burdened the exercise of their religious rights. See: *Luckette v. Lewis*, 883 F. Supp. 471 (D AZ 1995). Readers litigating this issue may be interested to note that a Hawaii district court upheld the constitutionality of the RFRA under a challenge mounted by the Hawaii attorney general's office who was defending against a prisoner's suit. See: *Belgard v. State of Hawaii*, 883 F. Supp. 510 (D HI 1995). ■

Jury Demand Must Be Timely

The court of appeals for the eleventh circuit, in a case of first impression for that circuit, held that the right to a jury trial is fundamental and reversed a bench trial ruling against a prisoner holding he should have received a jury trial. The case involves Robert Burns, a federal prisoner, who filed suit against prison officials for constitutional violations and the United States for tort violations. At the time Burns filed his suit he did not include a demand for jury trial in the complaint. After the defendants responded to the initial complaint Burns filed two amended complaints which added the Federal Tort Claims Act (FTCA) claims and the jury demand. The court set the matter for a bench trial, which Burns opposed, claiming he was entitled to a jury trial, and the court ruled in the defendant's favor. Burns appealed.

The court of appeals began by noting that interpreting the Federal Rules of Civil Procedure (FRCP) presents a question of law subject to *de novo* review. "We review the denial of a jury trial with the most exacting review."

Parties to civil litigation have a right to a jury trial under the seventh amendment of the US constitution. The right is not absolute and may be waived if the request for a jury trial is not made in a timely manner. It also noted that FTCA claims are not entitled to a jury trial.

FRCP 38 determines the timeliness of a demand for a jury trial, or its waiver. Rule 38 states that "the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury." A timely demand for a jury trial is made "by (1) serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d)." The question in this appeal was what constitutes a "pleading" for the purposes of Rule 38. The court turned to FRCP 7(a) and held that the list of items presented there, complaint, answer, reply to a counterclaim, answer to a cross claim, third party complaint or third party answer, were

the only items that could be considered "pleadings." Other circuit courts have likewise held that Rule 7 governs the construction of "pleadings" for Rule 38 purposes.

The defendants argued that the denial of a jury trial should be treated as harmless error and the verdict affirmed. The court noted that a harmless error analysis may be applied to denials of a jury trial only in cases where the issues could have been disposed of on summary judgment or judgment as a matter of law. Which was not the issue in this case. The appeals court soundly rejected this argument. "In cases like this, where the district judge carefully weighed the evidence and found it lacking, it is tempting to search for ways to affirm the district court. 'But juries are not bound by what seems inescapable logic to judges....' We therefore hold that the district court's decision cannot stand. Appellant is entitled to a jury trial on his *Bivens* claim." The case was vacated and remanded to the lower court for a jury trial. See: *Burns v. Lawther*, 53 F.3d 1237 (11th Cir. 1995). ■

Court Access May Require Counsel

The court of appeals for the ninth circuit has affirmed a lower court ruling holding that the right of court access requires either access to law libraries or the assistance of counsel only through the pleadings stage of civil rights complaints or habeas corpus petitions. The case arose from a suit filed by mental patients in the Idaho State Hospital South (SHS) claiming that the hospital violated their right of access to the courts by providing neither counsel nor law library access to assist in legal matters. The parties entered into a partial stipulated settlement where SHS agreed to hire a public defender to represent patients in habeas proceedings but that no payment would be provided to the public defender beyond the initial preparation of civil rights complaints. The district court held that the duty to provide counsel or law library access in habeas and civil rights cases ceases when the petition is filed in court. The court of appeals affirmed.

While this case involves mental patients the principles enunciated apply

with equal force to prisoners and other detainees. In fact, the majority of the cases cited by the court involve prisoner court access cases. The court notes that patients involuntarily committed to a mental institution have a right to court access just like prisoners, juvenile and pretrial detainees. The court gave ample discussion to the right of court access and how much assistance is actually required. "Considering the Court's discussion in *Wolff* and *Bounds* in totality, we conclude the Supreme Court has clearly stated that the constitutional right of access requires a state to provide a law library or legal assistance only during the pleading stage of a habeas or civil rights action."

The court held that what was at issue is the right of "access," not to representation. "The right of access is designed to ensure that a habeas petition or a civil rights complaint of a person in state custody will reach a court for consideration. Once the claim reaches a court, an indigent institutionalized person is in the same position as an indigent

non-institutionalized person filing, for example, a civil rights claim.... The court can determine whether the claim warrants appointment of counsel to represent the plaintiff. If so, the court may request an attorney to represent an indigent plaintiff."

This ninth circuit ruling is in accordance with rulings by several other circuits addressing this issue, most of which involve the amount of legal assistance provided to convicted prisoners in prison. The ruling presents interesting questions. Despite the court's assurance that courts can request counsel to represent plaintiffs in meritorious cases, the reality is that the ninth circuit has some of the worst case law on appointment of counsel in civil rights cases. Likewise, the possibility exists that prison officials can provide prisoners with law library access and as soon as they file a complaint in court, forbid them law library access with which to actually litigate their claim once it has been filed in court. See: *Cornett v. Donovan*, 51 F.3d 894 (9th Cir. 1995). ■

Contract Physicians Entitled to Qualified Immunity

The court of appeals for the seventh circuit has held that physicians hired by a prison to provide medical care are entitled to qualified immunity when sued by prisoners. As more and more prison systems attempt to cut medical care costs by contracting the care out, prisoner suits against the contracted medical care providers are likely to increase. This case involves Derrick Williams an Illinois state prisoner who claimed he was given inappropriate care for a bone infection in his leg. The prison doctors he sued, claiming they were deliberately indifferent to his serious medical needs thus violating his eighth amendment rights, were employees of a company called Correctional Medical Systems (CMS). The district court granted the defendants summary judgment, holding they were entitled to qualified immunity from suit. The district court held that the physicians were entitled to qualified immunity from liability for repeated acts of medical malpractice.

The court of appeals for the seventh circuit affirmed dismissal. On appeal Williams claimed that the defendant doctors were not entitled to raise the af-

firmative defense of qualified immunity because they were not government officials. The appeals court rejected this argument. "In cases involving 'a private party acting under government contract fulfilling a government function; parties fulfilling statutorily mandated duties under a contract; and a physician acting pursuant to a court order,' qualified immunity was applied." In this case the court held that the defendants were contracted, through CMS, to provide services to prisoners which the state was obligated to provide under the constitution. Thus, they were entitled to qualified immunity. See: *Williams v. O'Leary*, 55 F.3d 320 (7th Cir. 1995).

In the July, 1995, issue of *PLN* we reported *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994) where the fourth circuit court of appeals held that private physicians providing medical care to prisoners were subject to suit, under 42 U.S.C. § 1983, for violating prisoners' eighth amendment right to adequate medical care. While that case did not discuss immunity it did go into great detail discussing the elements a plaintiff must show in order to successfully sue a non state employee who is alleged to have

acted under "color of state law." It is logical to think that if a private party can be sued, just like a state official, for acting under "color of state law" then it is reasonable for that defendant to be able to assert a qualified immunity defense to liability for money damages. However, we believe that where Williams made his legal mistake (he was represented by counsel) was not so much in claiming the contract physicians weren't entitled to qualified immunity but in ignoring well reasoned decisions from other circuits holding that, instead, there is no qualified immunity defense available for those who violate prisoners' eighth amendment right to medical care. A case of missing the forest for the trees.

"A finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who *deliberately* ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law." *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992), [*PLN*, Vol. 4, No. 7]. We gave that case page-one coverage at the time because of its importance. ■

Resources

HIV/AIDS in Prison and Jail

The Department of Justice has released its latest statistics on the prevalence of HIV/AIDS in prison and jail facilities for 1993. As of that year 21,538 out of the 880,101 prisoners in state and federal prisons, 2.4% of the total, were known to be infected with HIV. 3,765 prisoners, or .4% had AIDS and 2,312 prisoners showed lesser symptoms of infection. The report states that 6,711 local jail detainees were infected with HIV of which 1,888 had AIDS and 1,200 had some symptoms.

The report carries detailed statistical information by gender, state, region and specific county jails with regards to those prisoners infected with AIDS and HIV. New York state with 8,000 infected prisoners, 12.4% of the total prison population, was the highest. It was followed by Florida with 1,780 or 3.4% of its population; Texas with 1,212 or 1.7%; California with 1,048 or .9%; Connecticut with 886 or 6.6% and New Jersey with 881 or 3.7%. All told nine states had more than 500 prisoners known to be infected. Washington state reported 63 infected prisoners.

The report also notes which states have mandatory HIV testing and those who conduct no testing. All states conduct some form of testing whether it is upon prisoner request, showing clinical symptoms, being in a high risk group for infection, random sample, etc. Fifteen states and the federal BOP test all prisoners admitted to the prison system.

AIDS is the second leading cause of death in prison, after "illness/natural causes," claiming the lives of 761 prisoners in 29 states in 1993. Roughly one third of all prisoner deaths were due to AIDS in 1993. This number was much higher in some states, such as New York where it comprised 58.4% of all deaths.

Anyone desiring a copy of the report, which is free, should contact: Bureau of Justice Statistics, P.O. Box 179, Annapolis Junction, MD 20701-0179. Ask for *HIV in Prisons and Jails, 1993*. NCJ-152765. ■

Texas Detainee Wins Damages for Ad Seg Placement

A federal district court in Texas awarded \$700 in compensatory damages to a county jail prisoner placed in administrative segregation without due process and held there for fourteen days. The court also considered the matter of prisoners' right to safety from attack by other prisoners. Benny Nettles was held in the Jefferson County (Beaumont), Texas, jail pending transfer to the Texas DOC after his parole had been revoked. While in the jail Nettles was transferred to administrative segregation (ad seg) for vague reasons and without any type of hearing. Due to a shortage of ad seg space Nettles and another prisoner were held in a psychiatric unit referred to by the court as "the nut run." While there Nettles's cell was set afire. After jail guards extinguished the fire Nettles was leaving the cell when he slipped, fell and suffered an incarcerated hernia requiring emergency surgery. Nettles spent a total of fourteen days in ad seg, and as a result of the fall he suffered the hernia injury and damage to his arm and elbow. Nettles filed suit claiming that the above events violated his rights to due process and to be free from cruel and unusual punishment.

After a bench trial, the court ruled in favor of Nettles on the ad seg claims and against him on the remaining issues. The court concluded that jail rules and regulations created a due process liberty interest for jail prisoners to remain in the general population and out of ad seg. [Editors' Note: The district court did not have the benefit of the supreme court's *Sandin v. Conner* ruling which signifi-

cantly recasts the jurisprudence of state created due process liberty interests.] After making that finding, the court went on to hold that Nettles had not received any due process before being placed in ad seg. The court commented that even at the time of trial it was unclear exactly why Nettles had been placed in ad seg.

The court, having found a due process violation, gave an extensive discussion of the damages due. The court lists and discusses numerous cases from several circuits where damages were awarded to prisoners wrongfully placed in segregation. The court lists the factors it considered in the award, the nature, extent and duration of the injury to the plaintiff, general pain and suffering, humiliation, mental distress and the violation of constitutional rights. Despite the fact that Nettles was placed in a unit for the mentally ill which resulted in his being set afire, being doused with hot water and other substances the court awarded very little in compensatory damages, perhaps a reflection of how much prisoners' suffering is actually "worth." With inflationary adjustments, the court held it had a range of \$30 to \$154 within which to award damages. It settled on \$50 damages per day, for a total of \$700. No punitive damages were awarded.

The court ruled that there was no merit to Nettles's eighth amendment claims concerning being set on fire by other prisoners. The court also awarded attorney fees in the action. See: *Nettles v. Griffith*, 883 F. Supp. 136 (ED TX 1995). ■

Chomsky Tape Available

Noam Chomsky is America's foremost dissident intellectual. He gives excellent, piercing analysis of American foreign and domestic policy and whose interests it serves. We have frequently recommended his books. Now, for a limited time PLN has a one hour radio version, on tape, of the movie *Manufacturing Consent: Noam Chomsky and the Media*. Puzzled about media coverage on crime and its bias? Chomsky spells it out in the foreign policy context.

These are factory tapes made out of transparent plastic, they are not factory sealed. These were donated to PLN for use as a fund-raiser. To order tapes please send \$10, per tape including shipping, to PLN and specify that you want the tape. This is a great buy with the money going to a worthy cause.

Prisoners Entitled to Rely on Marshalls for Service

The court of appeals for the seventh circuit has extended prior rulings and held that state prisoners are entitled to rely on the Marshalls service to serve their lawsuits on prison officials. The Marshall's failure to properly serve prison officials is "good cause" to avoid dismissal under Fed.R.Civ.P. 4(m) which requires service of the complaint on the defendants within 120 days of filing the complaint.

This case involves the consolidated appeals of two Indiana state prisoners. Both sued prison employees who no longer worked at the prison and the Marshalls were unable to serve them with the complaint. The district court dismissed the claims against the unserved defendants, holding they were not parties to the action as required by Rule 4(m). One of the prisoners, Sidney Wilson, obtained a default judgment against several of the served defendants involving the failure to treat a scalp problem, disposing of his mail, confiscating his radio and wrongfully disciplining him. The district court denied the defendants' motion to vacate the default and awarded Wilson \$550 in compensatory damages and ordered that Wilson be examined by a dermatologist and given appropriate treatment.

In both cases the marshalls were directed to serve the complaints on the named defendants on behalf of the prisoner plaintiffs. The marshalls failed to serve the defendants, who no longer worked at the prison, and they made no effort to locate them. The district court dismissed the defendants. The appeals court held that this outcome was incompatible with its ruling in *Sellers v. United States*, 902 F.2d 598 (7th Cir. 1990) where the appeals court held that a prisoner must only furnish the marshalls with enough information so they can identify the defendants. "We noted that once the former prison employee is properly identified, the Marshalls Service should be able to ascertain the individual's current address and, on the basis of that information, complete service... The prisoner may rely on the Marshalls Service to serve process, and the

Marshalls Service's failure to complete service is automatically 'good cause' to extend time for service under Rule 4(m)."

The court held that it was immaterial that this case involves state prisoners while *Sellers* involved a federal prisoner. "Sellers is grounded in the belief that use of marshalls to effect service alleviates two concerns that pervade prisoner litigation, state or federal: 1) the security risks inherent in providing the addresses of prison employees to prisoners; and 2) the reality that prisoners often get the 'run-around' when they attempt to obtain information through governmental channels and needless attendant delays in litigating a case result." The court noted that prisons cannot claim any security reason for not providing an ex employee's address to a federal law enforcement agency like the Marshalls. Likewise, there was no evidence that state public disclosure methods were an appropriate means for prisoners to obtain defendants' addresses.

On remand the district court was instructed to evaluate the Marshalls' efforts to locate the defendants and the adequacy of the state disclosure procedures in light of *Sellers*. "If the Marshalls Service could have obtained the new addresses of the defendants with reasonable efforts, the Marshalls' failure to serve process was 'good cause' for purposes of Rule 4(m). Of course, if the failure to serve process was due to appellant's failure to cooperate with the Marshalls Service, there may not be good cause and dismissal may be appropriate."

Addressing Wilson's claim that the amount of damages he was awarded on default were insufficient, the court held that the award of \$550 was not clearly erroneous in light of the evidence presented to the lower court. The award of damages was affirmed and the remaining claims concerning the Marshalls' failure to serve the defendants in both cases were remanded to the lower court for further proceedings. See: *Graham v. Satkoski*, 51 F.3d 710 (7th Cir. 1995). ■

News in Brief

Venezuela: On September 22, 1995, police entered the Catia prison in Caracas to search for weapons and drugs when prisoners shot at them. In a five hour riot four prisoners were killed and 26 people injured, including a guard and a policeman. Hundreds of soldiers stormed the prison and regained control later that day. The prison was designed for 700 prisoners but houses 2,123.

WA: Kenneth Peterson, a Washington State Reformatory prisoner escaped from a Monroe hospital he had been taken to for treatment of a heart attack. Peterson was under a guard's supervision in a private room when he simply walked away in hospital pajamas on October 10, 1995. He was caught a few hours later, hiding in a restaurant dumpster in Monroe a mile from the hospital. Peterson had been serving a sentence of life without parole involving two homicides.

Mexico: On October 25, 1995, more than 1,000 soldiers and police stormed the Puebla state penitentiary to end an 11 day rebellion by prisoners demanding better conditions at the overcrowded prison.

WA: On September 19, 1995, Richard Stewart, a guard at the Snohomish County Jail, was stabbed with a sharpened metal pipe by detainee Kurt Angelone. Stewart suffered minor injuries in the attack. No reason was given for the assault. Angelone was scheduled to go on trial to face charges of child rape and molestation.

OH: Tracy Snyder, a former guard at the Lima Correctional Institution, was sentenced on October 15, 1995, to two years in prison for smuggling vodka and marijuana into the prison. Acting on a tip, prison investigators searched Snyder when she arrived at work and found 68 grams of marijuana and two 20 ounce pop bottles filled with vodka.

MI: In September, 1995, Larry Miller, a former guard at the Pontiac Corrections Facility pleaded no contest to third degree criminal sexual conduct after forcing a female prisoner to repeatedly have sex and perform other sex acts with him. Miller was sentenced to five to fifteen years imprisonment. ■